LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM 1970

No. .....

THEODORE W. PARKER, individually and as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

and JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

against

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, SIERRA CLUB AND THE VILLAGE OF TARRYTOWN, NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOEL H. SACHS
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Citation to the Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statements of the Case	4
Facts	4
Reasons for Granting the Writ	7
1. The determination of the Courts below that "dikes" are involved in the construction of the Expressway conflicts with prior decisions of this Court, gives a strained and illogical interpretation to Sections 9 and 10 of the Rivers and Harbors Act of 1899 and violates a long-standing administrative interpretation of the statutes in question	7
2. The mere possibility that the Hudson River Expressway may involve construction of a causeway within the meaning of Section 9 of the Rivers and Harbors Act of 1899 did not give the Courts below authority to enjoin the issuance of a permit under Section 10 of that Act	14
3. The determination of the Courts below that the plaintiffs below, lacking a legally protected interest, lacking any injury and lacking a specific statute on which to bring suit, have standing to challenge the actions taken by the State and Federal officials was an unwarranted application of recent decisions of this Court	15

PAGE

Conclusion 18

Appendix A 1a

Judgment of Affirmance 19a

Appendix B 21a

Appendix C 39a

CASES PAGE

Aetna Life Ins. Co. v. *Haycorth*, 300 U. S. 277 (1937) 14
Barlow v. *Collins*, 397 U. S. 159 (1970) 15, 17

Bloch River Regulating District v. *Adirondack League Club*, 307 N. Y. 475 (1954) appeal dismissed 351 U. S. 922 (1956) 17

Boston Sand Co. v. *U. S.*, 278 U. S. 41 (1928) 11

Citizens Committee, et al. v. *Volpe, et al.*, 425 F. 2d 97 (2d Cir. 1970) 2

Citizens Committee, et al. v. *Volpe, et al.*, 302 F. Supp. 283 (S.D.N.Y. 1969) 2

Citizens Committee, et al. v. *Volpe, et al.*, 297 F. Supp. 804 (S.D.N.Y. 1969) 5

County of Albany v. *Hooker*, 204 N. Y. 1, 9 (1912) ... 17

Data Processing Service v. *Camp*, 397 U. S. 150 (1970) 15, 16, 17

Flast v. *Cohen*, 392 U. S. 83 (1968) 15

	PAGE
Glus v. *Brooklyn Terminal*, 359 U. S. 231 (1959)	10
Golden v. *Zwickler*, 394 U. S. 103 (1969)	14
Mastro Plastics Co. v. *Labor Bd.*, 350 U. S. 270 (1956)	11
Muscrat v. *U. S.*, 219 U. S. 346 (1911)	14
N.L.R.B. v. *Coca Cola Bottling Co.*, 350 U. S. 264 (1956)	11
Richards v. *U. S.*, 369 U. S. 1 (1962)	11
Scenic Hudson Preservation Conference v. *F.P.C.*, 354 F. 2d 603 (2d Cir. 1968)	17
Udall v. *Tallmon*, 380 U. S. 1, 16 (1965)	10
United States v. *Midwest Oil Co.*, 236 U. S. 459 (1915)	11
United States v. *Republic Steel Corp.*, 362 U. S. 482 (1960)	9, 10, 11
United States v. *Union Pacific Railway*, 353 U. S. 112 (1957)	10
Wisconsin v. *Illinois*, 278 U. S. 367 (1929)	7, 8, 9, 10, 11

STATUTES

	PAGE
Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (Supp. IV)	5
Department of Transporation Act, 49 U.S.C. § 1055(g)	6, 15
Rivers and Harbors Act of 1899, sec. 9, 33 U.S.C. § 401	3, 6, 9, 11, 12, 13, 14, 15
Rivers and Harbors Act of 1899, sec. 10, 33 U.S.C. § 403	3, 7, 9, 11, 13, 14, 15
N. Y. Highway Law, § 340-c	4

Opinions	Page
15 Op. A. G. 515 (1875)	12
15 Op. A. G. 526 (1880)	12
16 Op. A. G. 479 (1880)	12
34 Op. A. G. 410 (1925)	11

Text	Page
Chambers, Technical Dictionary, 3rd Revised Edition with Supplement (1958)	12
Websters, Third New International Dictionary (1966)	12

Supreme Court of the United States

OCTOBER TERM 1970

No. .....

THEODORE W. PARKER, individually and as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

and JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

against

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, SIERRA CLUB AND THE VILLAGE OF TARRYTOWN, NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Commissioner of the Department of Transportation of the State of New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the consolidated cases of *Citizens Committee for the Hudson Valley, the Sierra Club and the Village of Tarrytown,*

New York v. *John Volpe et al. and J. Burch McMorran et al.* (judgment entered on April 16, 1970). This decision affirmed a judgment of the United States District Court for the Southern District of New York, dated July 25, 1969.

Citation to the Opinions Below

The opinion of the Court of Appeals is reported at 425 F. 2d 97 (2d Cir. 1970). It is annexed hereto as Appendix "A" to this petition. The District Court opinion is reported at 302 F. Supp. 283 (S.D.N.Y. 1969). It is annexed hereto as Appendix "B" to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on April 16, 1970.

The jurisdiction of this court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a federal court can enjoin the Corps of Engineers from issuing a permit under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. sec. 403, to deposit fill and construct bulkheads in the Hudson River, by invoking Section 9 of that Act, 33 U.S.C. sec. 401, which relates to the construction of dikes.

2. Whether Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. sec. 403, authorizes the Corps of Engineers to grant a permit to fill and construct bulkheads in the Hudson River without the prior specific consent of Congress.

3. Whether a federal court can enjoin the Corps of Engineers from issuing a permit under Section 10 of the

Rivers and Harbors Act of 1899, 33 U.S.C. sec. 403 to deposit fill and construct bulkheads in the Hudson River on the mere possibility that the State of New York, may, on some future occasion, determine to construct a causeway which requires a permit under Section 9 of the Act, 33 U.S.C. sec. 403.

4. Whether respondents, lacking a legally protected interest and lacking a specific statute on which to bring suit, had standing to challenge the actions taken by the petitioners.

Statutes Involved

Section 9 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. sec. 401 *et seq.*, provides in part (33 U.S.C. sec. 401):

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river * * * of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same have been submitted to and approved by the Chief Engineers and by the Secretary of the Army; * * *

and Section 10 of the Act provides in part (33 U.S.C. sec. 403):

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any * * * navigable river, or other water of the United States * * * except on plans recommended by the Chief of Engi-

neers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill [in a navigable waterway of the United States] * * * unless that work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Statements of the Case

Facts

The Hudson River Expressway is a proposed six lane roadway to be built along with and through a proposed riverfront park between Tarrytown and Crotonville, New York. The roadway is being constructed in response to an extremely critical traffic situation which has been developing in the Tarrytown-Crotonville corridor over a number of years. It is undisputed that the existing route serving this area, U. S. Route 9, is incapable of handling the ever-increasing volume of traffic; latest statistics conclusively show that this route has the highest accident rate of any roadway in the vicinity. Hence, the proposed 10 mile Expressway has received top priority from State officials.

In and by Chapter 292 of the Laws of New York, 1965, as amended by Chapter 128 of the Laws of New York, 1966, N. Y. Highway Law § 340-e the State Legislature enacted the Expressway Law to provide for a new roadway in the Route 9 corridor. Since that time, the New York State Department of Transportation has been in the process of designing a roadway which will satisfy the demands of the Tarrytown-Crotonville traffic corridor. It should be noted at the outset that *the proposed expressway is an entirely intrastate roadway. No federal funds are in any way involved in its construction.*

However, since a portion of the roadway is to be built upon fill to be placed in the Hudson River,* it was necessary for the New York State Department of Transportation to obtain an appropriate permit from the Corps of Engineers, United States Army, since the Corps has jurisdiction over the Hudson River, a navigable body of water. After receipt of New York's application for a permit, the Corps of Engineers proceeded to study the Expressway project. As a result of their studies, hearings, consultations with other federal agencies, including the United States Department of Interior, it was decided to grant the necessary permit to the New York State Department of Transportation.

The permit gives permission to the New York State Department of Transportation:

> "[T]o dredge and place fill, protected by stone slope protection and to construct piers and bulkheads with floats and mooring piles; the dredged matter to be suitably retained by dikes to prevent its return into the waterway; in the Hudson River, between Tarrytown and Ossining, Westchester County, New York subject to certain conditions not pertinent hereto."

Immediately after the Corps of Engineers issued the permit on January 27, 1969, respondents commenced these actions and sought a preliminary injunction to restrain the delivery of such permit. Jurisdiction was allegedly based on the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (Supp. IV).

This motion for a preliminary injunction was denied by the District Court. *Citizens Committee for the Hudson Valley* v. *Volpe*, 297 F. Supp. 804 (S.D.N.Y. 1969). The United States Court of Appeals for the Second Circuit affirmed the denial of injunctive relief in an unreported decision on March 19, 1969, but ordered the entire matter remanded

---

* The proposed fill is in the area of the Tappan Zee, the widest part of the Hudson River (approximately 11,600 feet wide). The fill will extend between 300 feet and 1350 feet into the river, depending on its location, with an average incursion of 665 feet.

to the District Court for an early trial pursuant to the applicable rules of the Court.

Thereafter, a trial was held on all issues raised in the complaints. During the trial, which consumed 29 days, the court heard over 4,000 pages of testimony by over 20 witnesses and examined well over 1,000 pieces of documentary evidence, including studies, maps and diagrams of the proposed expressway.

In its decision dated July 11, 1969, the Court ruled that it had jurisdiction to entertain the actions, that plaintiffs had standing to raise the issues presented to the Court, that the Corps of Engineers exceeded its statutory authority in issuing the fill permit to the New York State Department of Transportation and that the Highway Law of the State of New York, insofar as it delegated certain powers to the Commissioner of Transportation, was not unconstitutional. A copy of the District Court's decision is annexed hereto as Appendix "B".

As a result of the District Court's decision, an order was entered on July 25, 1970 declaring that the construction of the Hudson River Expressway by the State of New York involves the construction of "dikes" and causeways within the meaning of Section 9 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. sec. 401 and that construction of said "dikes" requires the consent of the Congress of the United States and the construction of said causeway requires consent of the Congress of the United States and the approval of the Secretary of Transportation of the United States pursuant to the Department of Transportation Act, 49 U.S.C. § 1055(g).

The Court further decreed that, as a result of such holding, the Corps of Engineers had exceeded its statutory authority in issuing the permit to the State of New York and said permit was declared null and void. The order enjoined the Corps of Engineers from issuing a permit to the State of New York until the requisite approvals were obtained from the Congress of the United States and from the Secretary of Transportation of the United States

and the State of New York was permanently enjoined from proceeding in any matter with construction of the Hudson River Expressway until the requisite federal approvals were obtained for the construction of the "dikes" and causeway. A copy of the order of the District Court is annexed hereto as appendix C.

On appeal to the United States Court of Appeals for the Second Circuit, the decision of the District Court was affirmed in an opinion dated April 16, 1970, the Court of Appeals accepting the District Court's determination as to the standing of plaintiffs and the presence of "dikes" and a causeway involved in the construction of the Hudson River Expressway. A copy of the decision and judgment of the Court of Appeals is annexed hereto as Appendix "A".

Reasons for Granting the Writ

1. The determination of the Courts below that "dikes" are involved in the construction of the Expressway conflicts with prior decisions of this Court, gives a strained and illogical interpretation to Sections 9 and 10 of the Rivers and Harbors Act of 1899 and violates a long-standing administrative interpretation of the statutes in question.

The permit in question was issued under the authority of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. sec. 403. There is no question that the placing of fill and the construction of bulkheads in a navigable waterway are specifically named in Section 10 as activities permissible with approval of the Secretary of the Army alone—not requiring a special authorization by Congress. This construction of Section 10 was confirmed by this Court in *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929), where it was stated (at 412-414):

> "* * * Congress, having stated in Section 9 as to what particular structures its specific consent should be re-

quired, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. The Supreme Court of Maine in *Maine Water Co. v. Knickbocker Steam Towage Co.*, 99 Me. 473, took the same general view in construction of the same section. It held that the broad words of the first clause of that section were not intended to limit the second and third clauses and that Congress's purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view.

The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.

This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. *United States* v. *Minnesota*, 270 U. S. 181, 205; *Swending* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Kern River Co.* v. *United States*, 257 U. S. 147, 154; *United States* v. *Burlington & Missouri River R.R.*,

98 U. S. 334, 341, *United States* v. *Hammers*, 221 U. S. 220, 228; *Logan* v. *Davis*, 233 U. S. 613, 627.

The practice is shown by the opinion of the Acting Attorney General, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the Act. This was followed by the permits subsequently granted down to March 3, 1925. The fact that the Secretary of War acted on this view was made known to Congress by many reports."

Cf. *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 488, 491 (1960). The physical action authorized here was the filling of a portion of the Hudson River and the construction of bulkheads to prevent the fill from sliding into the River—neither action requiring the special consent of Congress. The mere fact that the permit refers to "dikes" does not change the applicability of Section 10 nor alter the fact that the physical action proposed under the permit does not require the consent of Congress.

The District Court's determination that "dikes" are involved in the construction of the Expressway is based upon the following reasoning which was adhered to by the Court of Appeals: Since the permit application submitted to the Corps of Engineers mentions the word "dike", there is therefore a dike and consequently, the Corps of Engineers has no authority to issue the permit.

The lower court's overly simplistic approach to the word "dike" violated an elementary principle of statutory construction, indicated that the court failed to read Sections 401 and 403 as interdependent, failed to take into account a longstanding administrative interpretation of the statutes in question, and totally ignored the unimpeached testimony by three expert witnesses, who testified that there was no "dike" within the meaning of Section 401, involved in the construction of the Expressway. By exalting form

over substance, by relying on labels rather than reality, and by failing to critically examine the functions to be performed by the so-called "dike", the Court below has seriously undermined the authority of the Corps of Engineers to issue fill permits and has delayed the start of construction on an urgently needed roadway in the State of New York. In a matter of such public importance, this Court should grant certiorari. See, *United States* v. *Republic Steel Corp., supra; United States* v. *Union Pacific Ry. Co.*, 353 U. S. 112 (1957); *Glus* v. *Brooklyn Terminal*, 359 U. S. 231 (1959).

To accept the determination of the court below would mean that such diverse projects as a state highway along the Ohio River in Louisville, Kentucky, a railroad right of way along the Cowlitz River in Oregon, a recreation area in the Charles River, Boston, Massachusetts, the runways at both LaGuardia and Kennedy Airports in New York City, the enlargement of Fort Monroe into Mill Creek at Hampton, Virginia, the creation of a new street along the Willamette River in Portland, Oregon, and the expansion of East Harbor State Park into Lake Erie were all constructed illegally because *in each of these instances, as well as in numerous others, the application for a fill permit mentioned the word* "dikes".

While this Court in *Wisconsin* v. *Illinois* indicated that some 30 years of consistent administrative practice had preceded that case (278 U. S. at 413), we now have 70 years of such practice during which the type of permit issued here has been consistently authorized by the Secretary of the Army without special authorization by Congress. "Nothing is more convincing in interpretation of a doubtful or ambiguous statute." 278 U. S. at 413; *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). And, as this Court stated (278 U. S. at 414), Congress has been continually advised by reports, etc., of this administrative interpretation. See: *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474 (1915).

It is submitted that unless this court grants review of this matter, the long standing administrative practice of permitting the Corps of Engineers to issue fill permits will be at an end and *the responsibility will be thrust upon Congress to personally examine each application for a dredging and filling operation to be conducted in any navigable body of water in the United States.* Such an approach is clearly contrary to the congressional intent embodied in the Rivers and Harbors Act and makes the statutory language of these sections *reductio ad absurdum.* Furthermore, the available legislative history on Sections 9 and 10 is completely contrary to the decisions of the Courts below.

Indeed, the decision below has the effect of rendering Section 10 of the Act a virtual nullity, since it would be difficult to imagine what structures along a navigable waterway would not be considered "dikes". Certainly, breakwaters, bulkheads, and jetties, also commonly used methods to retain fill and also listed in Section 10, would be. It makes no sense to prohibit in one section of an act of Congress what is permitted by another. *Wisconsin* v. *Illinois, supra;* 34 Op. A. G. 410, 416 (1925); Cf. *United States* v. *Republic Steel Corp., supra.*

In construing a statute, every effort should be made to construe it as a harmonious whole so as to effectuate the legislative purpose and not adopt strained constructions. *Richards* v. *United States,* 369 U. S. 1, 11 (1962); *Mastro Plastics Co.* v. *Labor Board,* 350 U. S. 270, 285 (1956). Words in a statute should be construed in the context of their subject matter and not in their everyday sense if such appears from the statute. *N.L.R.B.* v. *Coca-Cola Bottling Co.,* 350 U. S. 264 (1956); *Boston Sand Co.* v. *U. S.,* 278 U. S. 41, 48 (1928).

Judged by these standards, the interpretation given the word dike by the courts below is entirely untenable as a matter of law. The "dike" mentioned in Section 9 of the Rivers and Harbors Act along with the words bridges,

dams and causeways must be viewed in conjunction with those words. All of these are significant structures, spanning the length of a waterway and controlling the flow of water. The so-called "dike" involved in the construction of the Hudson River Expressway neither spans the river nor controls its flow. Rather, the "dike" is akin to the wharfs, piers, dolphins, breakwaters, bulkheads and jetties mentioned in Section 9 of the Act, all less significant engineering structures under which Congress indicated it need not pass upon and instead delegated responsibility to the Corps of Engineers.

The type of "dike" mentioned in the contested permit is not the type of engineering dike that Congress was concerned with in Section 9 of the Act. At the trial, both the State and Federal Government produced three highly qualified engineers who testified that the proposed fill project did not involve a dike in the sense that the term is used by laymen and engineers. This testimony merely confirmed that as a matter of law, there is no "dike" involved within the meaning of Section 9.

Furthermore, the proposed construction is not a dike in the common use of the word. The dictionary tells us that a dike is "a bank, usually of earth constructed to control or confine water". Webster, *Third New International Dictionary* (1966 unabridged) p. 632. Even prior to the 1899 Act, a "dike" was considered by the Attorney General of the United States as Webster defines it. 16 Op. A. G. 479 (1880); 15 Op. A. G. 526 (1880); 15 Op. A. G. 515 (1875).

An acceptable engineering definition of the word "dike" is found in Chambers Technical Dictionary, 3rd Revised Edition with Supplement, 1958, page 273:

> "A wall or enbankment of timber, stone, concrete, fascines, or other material, built as a training works for a river so as rigidly to confine the flow within definite limits over the length treated."

However, all testimony at the trial was to the effect that the "dike" mentioned in the permit did not fall within these definitions but rather was a construction term which denoted a *method* utilized to retain the fill and prevent it from returning into the waterway. Other common construction methods of fill retention as testified to by the engineers, included bulkheads, pre-cast concrete blocks and poured concrete walls, all structures admittedly falling within the ambit of Section 10. In its reasoning that "a dike is a dike" the court disregarded this testimony and rested its decision solely upon mere labels.

There is no question but that if other methods of construction had been used to retain the fill, no basis for the claim that congressional approval is necessary would lie. *It is absolutely inconceivable that Congress would intend a law to show such concern over a land reclamation project such as is involved herein so as to require its specific approval when a* "rock dike" *method of construction is used to retain the fill area, and not have any such concern when other methods of construction are employed as retaining structures.*

The rationale of the decision below makes inescapable the conclusion that had the State of New York utilized another method of fill retention, other than the one labeled "rock dike", the court would not have found the existence of a "dike" within the meaning of Section 401. The Court's reliance on the label rather than on the function of the structure to be built, is fatal to its decision.

The untenable interpretation given to the word "dike" by the courts below, which requires consent of Congress in every case where the land fill retention method is labeled a "dike" defeats rather than serves, the congressional purpose of having these matters passed upon by the Corps of Engineers. By including any type of retaining structures within Section 9 of the statute, the courts below have contravened the intent of Congress and have sub-

stantially nullified Section 10. Furthermore, the decisions below have prevented the start of construction on this urgently needed roadway.

2. The mere possibility that the Hudson River Expressway may involve construction of a causeway within the meaning of Section 9 of the Rivers and Harbors Act of 1899 did not give the Courts below authority to enjoin the issuance of a permit under Section 10 of that Act.

The Courts below found that a small portion of the proposed Expressway, not included within the permit area and outside the fill area described therein, would require a causeway within the meaning of Section 9 of the Act. The court held that since such causeway would be part of the Expressway, the Corps of Engineers should have sought the approval of the Secretary of Transportation of the United States and Congress before issuing the permit. This approach is without warrant, unprecedented and would create havoc.

The major error in the Court's finding is that no such causeway is encompassed within the scope of the permit application. The permit authorizes the State of New York to dredge and place fill in a portion of the Hudson River. No causeway is contained within the limits of the fill project. Although the District Court admitted that "this causeway is not *per se* part of the fill project which the corps of engineers' permit authorized", the Court went on to state that "the corps still had the obligation to consider it and recognize its reality before issuing the permit". Such an approach is totally unwarranted.

It is basic that a Court should consider only the actual case or controversy before it, and should not pass on hypothetical situations nor give advisory opinions. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 277 (1937); *Muskrat* v. *United States*, 219 U. S. 346 (1911); *Golden* v. *Zwickler*, 394 U. S. 103 (1969).

The sole issue for the Court's below to determine was whether there was a causeway encompassed within the area of the fill project. If no such causeway was contained within such area, that Court was without jurisdiction to consider and pass upon other possible areas of construction. *If and when the New York State Department of Transportation does determine to build a causeway south of the southernmost point of the fill project it would then have to seek permission from Congress and the Secretary of Transportation pursuant to Section 9 of the Rivers and Harbors Act*, 33 U.S.C. § 401 and the *Department of Transportion Act*, 49 U.S.C. § 1655(g).

This lack of any jurisdictional basis is emphasized by unimpeached testimony elicited at the trial that the State of New York had not in fact yet made a final decision as to what type of structure would be constructed south of the permit area.

The Rivers and Harbors Act of 1899 does not require that a Section 10 permit be held up whenever a Section 9 permit might also be required for some possible future portion of an applicant's proposed project. To order the Corps of Engineers to consider, in granting a Section 10 permit, a non-existent causeway and to order the State of New York to apply for permission to construct such causeway at the present time when it is not known whether a causeway will ever be authorized, was unwarranted.

3. The determination of the Courts below that the plaintiffs below, lacking a legally protected interest, lacking any injury and lacking a specific statute on which to bring suit, have standing to challenge the actions taken by the State and Federal officials was an unwarranted application of recent decisions of this Court.

Recent decisions of this Court regarding the issue of standing, in the cases of *Flast* v. *Cohen*, 392 U. S. 83 (1968); *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970) and *Barlow* v. *Collins*, 397 U. S. 159 (1970), have ap-

parently created the impression that standing is no longer an issue in any matter involving review of the actions of State and Federal officials. It is submitted that none of the aforementioned decisions, nor any other decisions of this Court have ever gone so far as to allow any individual or organization whatsoever to bring suit to protest any governmental action or proposed action. Standing still remains a valid concept in our judicial system.

In order for a litigant to have standing to challenge the action of State or Federal officials in Federal Court, this Court has always required petitioners to show that the challenged action has (1) caused injury to the plaintiff, economic or otherwise and (2) that the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service* v. *Camp*, *supra*. Turning first to the question of injury, it is extremely doubtful that plaintiffs below have the personal stake and interest that impart the adverseness required by Article III of the Constitution.

The plaintiffs below consisted of an Ad Hoc committee formed to lobby against the Hudson River Expressway, a California corporation which agreed to lend its name and its prestige to the local citizens committee and a village along the shore of the Hudson River. Uncontroverted testimony at the trial indicated that the Citizens Committee owned no property in the proposed path of the Expressway and that no member owned any home or property that would be condemned or destroyed and the Court below so found. As regards the Sierra Club, no proof was offered that any member owned or resided in any property in the proposed path of the Expressway, nor was it shown that the Sierra Club was active in or engaged in any environmental acivities in the Hudson River Valley. Since the club owned no wildlife sanctuaries, no nature trailways nor other property, clearly there is no injury which the Sierra Club could claim.

Finally, the Village of Tarrytown could not point to any injury as a result of the construction of the Expressway.

The sole proof offered for standing was the loss of tax assessments on several private properties which would be taken by construction of the Expressway. The Court below erred in converting this loss of assessments into a loss of tax revenues in spite of the fact that uncontroverted proof indicated that from the moment the construction of an expressway is announced, the adjacent properties increase in value to such an extent that they more than offset the loss of tax revenues and would actually create an economic gain for the Village of Tarrytown. Moreover, the village is a subdivision of the State and as such has no legal standing to assail the validity of the state action. *Bloch River Regulating District* v. *Adirondack League Club*, 307 N. Y. 475 (1935), appeal dismissed, 351 U. S. 922 (1956); *County of Albany* v. *Hooker*, 204 N. Y. 1, 9 (1912). It is wholly anomalous to permit a village to challenge in the federal court the state action.

Turning to the other requirement set forth by this Court in *Data Processing Service* v. *Camp, supra*, it is clear that none of the plaintiffs below were within the zone of interests protected or regulated by a statute or constitutional guarantee. There is no constitutional provision such as the First Amendment which was available in *Flast* v. *Cohen, supra*. Nor is there a specific statutory provision such as Bank Service Corporation Act of 1962 which was utilized in *Data Processing Service* v. *Camp, supra*; nor the Food and Agriculture Act of 1965 which was utilized in *Barlow* v. *Collins*. Furthermore, in *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 603 (2d Cir. 1968), which was cited with approval by this Court in *Data Processing Service* v. *Camp, supra*, plaintiffs there relied upon the Federal Power Act so as to give them a legal protected interest. Here, absent such a statute creating any protectable interest on behalf of any of the plaintiffs below, the requisites for standing have not been satisfied.

Furthermore, plaintiffs below have failed to show that they come within the rationale of the *Scenic Hudson* case

as groups "who by their activities and conduct have exhibited a special interest" in "aesthetic, conservational, and recreational values". No evidence was produced at trial that the Ad Hoc Citizens Committee ever engaged in any aesthetic, conservation or recreational activities other than opposing the expressway. While we have no quarrel with the good faith of the Sierra Club, the proof showed that this organization never engaged in any type of environmental activities in the State of New York or the Hudson River Valley. Finally, no claim was made by the Village of Tarrytown that it had ever engaged in any type of conservation activities in the area. To the contrary, testimony showed that the Village maintained a huge and unsightly refuse dump precisely where the state intends to construct the Expressway.

In view of the public discussion permeating the press and other public media with respect to protection of natural resources as against the pressing needs for public improvements, the issue of the standing of such *ad hoc* groups deserves, if not compels, delimitation by this Court. It is plain that the recent decisions by this Court has created substantial uncertainty requiring clarification.

CONCLUSION

A petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Petitioner

Samuel A. Hirshowitz
First Assistant Attorney General

Joel H. Sachs
Assistant Attorney General
of Counsel

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 428-33—September Term, 1969.

(Argued December 8, 1969 Decided April 16, 1970.)

Docket Nos. 34010, 34057-58, 34081, 34099, 34100

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, THE SIERRA CLUB AND THE VILLAGE OF TARRYTOWN, NEW YORK,

Plaintiffs-Appellees,

—against—

JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, Individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, Individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, Individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

Defendants-Appellants,

J. BURCH MCMORRAN, Individually and as Commissioner of the Department of Transportation of the State of New York,

Intervenor-Appellant.

Appendix "A".

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, THE SIERRA CLUB AND THE VILLAGE OF TARRYTOWN, NEW YORK,

Plaintiffs-Appellants,

—against—

J. BURCH MCMORRAN, Individually and as Commissioner of the Department of Transportation of the State of New York,

Defendant-Appellee.

Before:

MOORE and KAUFMAN, *Circuit Judges:*
RYAN,* *District Judge.*

Defendants appeal from an order of the District Court for the Southern District of New York, Thomas F. Murphy, *Judge*, permanently enjoining the United States Army Corps of Engineers from issuing a permit to the State of New York to dredge and fill in the Hudson River for construction of a proposed Expressway without the prior approval of the Secretary of Transportation and in the absence of the consent of Congress, and further enjoining the New York Department of Transportation from proceeding with construction of the Expressway without such approval and consent.

The Plaintiffs appeal from that portion of the District Court's order which dismissed their claims against J. Burch McMorran, Commissioner of the Department of Transportation of the State of New York, based on alleged unconstitutionality of certain sections of New York Highway Law.

Affirmed.

---

* Of the Southern District of New York, sitting by designation.

Appendix "A".

DAVID SIVE, New York, N. Y. (Alfred S. Forsyth, Sigmund Anderman and David Perlmutter, Winer, Neuburger & Sive, New York, N. Y., of counsel), *for Plaintiffs-Appellees-Appellants Citizens Committee, Sierra Club and Village of Tarrytown.*

ROBERT S. LYNCH, Attorney, Department of Justice, Washington, D. C. (Shiro. Kashiwa, Assistant Attorney General, and Edmund B. Clark, Attorney, Department of Justice, Washington, D. C.; Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., and Peter R. DeFilippi, Assistant United States Attorney, New York, N. Y., of counsel), *for Appellants Volpe, et al.*

JOEL H. SACHS, Assistant Attorney General, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, The Capitol, Albany, N. Y., and Mark T. Walsh, Assistant Attorney General, and Samuel A. Hirshowitz, First Assistant Attorney General, New York, N. Y., of counsel), *for Intervenor-Appellant-Appellee-McMorran.*

MOORE, *Circuit Judge:*

The present appeal is a consolidation, ordered by this Court on October 27, 1969, of several separate appeals taken from a final order and judgment entered by the district court on July 25, 1969. Trial and judgment below in turn followed a consolidation of four separate actions brought by the various plaintiffs against the various defendants here on appeal. The opinion of the district court, setting out the facts, the various claims and Judge Murphy's conclusions of law, is reported at 302 F. Supp. 283 (S.D.N.Y. 1969).

Appendix "A".

These actions arose out of a proposal by the New York State Department of Transportation for construction of the Hudson River Expressway. The plaintiffs object to the proposed construction of a six-lane arterial highway, designed for both commercial and passenger traffic, along a ten-mile stretch of the Hudson River's eastern bank between Tarrytown and Crotonville. Before construction of the Expressway can begin, the New York Department of Transportation must secure the approval of certain federal agencies, because the planned construction requires dredging and filling in a portion of the Hudson River along the shoreline, and the Hudson is a navigable waterway under federal jurisdiction. The New York Department of Transportation proposes placing some 9,500,000 cubic yards of fill, bound by a rock wall, along a portion of the river's bank. The landfill would extend, at its widest point, approximately 1,300 feet (nearly a quarter of a mile) into the Hudson.

Upon application of the State of New York, the United States Army Corps of Engineers (the Corps) issued a permit authorizing the dredge and fill operation pursuant to its authority under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 et seq. Arguing that the proposed construction involved both a "dike" and a "causeway" within the meaning of § 401, the plaintiff's sought (1) a declaration that the permit as issued was beyond the scope of the Army's authority, and (2) injunctive relief to prohibit the issuance of any permit or the commencement of any construction in the absence of congressional consent and approval of the Secretary of Transportation.[1] The district

---

[1] Rivers and Harbors Act of 1899, section 9, 33 U.S.C. § 401, provides in pertinent part:

> It shall not be lawful to construct or commence the construction or any bridge, dam, dike, or causeway over or in any . . .

(*footnote continued on following page*)

court agreed, finding that a 4½ mile rock wall jutting into the river constituted a "dike" and that the Expressway project would require construction of a "causeway" before its completion. The district court held that the Corps had breached a nondiscretionary duty to secure the consent of Congress and the approval of the Secretary of Transportation before issuing the permit. The permit was declared void, and the court granted the injunctive relief sought against the federal defendants and against J. Burch McMorran, the New York Commissioner of Transportation. All defendants appeal from this order.

(*footnote continued from previous page*)

> navigable river . . . of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army. . . .

The defendants contend that construction of the landfill as proposed was referable only to section 10 of the Act, 33 U.S.C. § 403, which provides in part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any navigable river, or other water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill [in a navigable waterway of the United States] . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Approval of the Secretary of Transportation is required where construction of a bridge or causeway is contemplated by virtue of the Department of Transportation Act, 49 U.S.C. § 1655(g) (1966), which transferred jurisdiction over bridges and causeways from the Secretary of the Army to the Secretary of Transportation. See Judge Murphy's discussion of the statutory interrelationships in the opinion below, 302 F. Supp at 1087.

Appendix "A".

The plaintiffs also appeal from a portion of the district court's order which dismissed their claims against McMorran as a primary defendant. These claims challenged the constitutionality of the Expressway Law,[2] which authorized McMorran as Commisisoner of Transportation to fix the exact route of the roadway and oversee its construction, and of section 30 of New York Highway Law, which prescribes the condemnation procedures in connection with highway construction. They also claimed that a lump sum appropriation by the New York legislature for general highway construction was an impermissible delegation of the spending authority. Their final claim was an equitable action against McMorran charging violation of the Rivers and Harbors Act in seeking to proceed with construction of the Hudson River landfill without congressional consent and approval of the Secretary of Transportation. The district court dismissed these claims, but granted injunctive relief against McMorran as intervenor-defendant in the actions against the federal defendants.

Important threshold questions on this appeal involve the jurisdiction of the district court over the subject matter of these actions, and the standing of these plaintiffs to seek review of agency action in federal court. We turn first to jurisdiction.

---

[2] Highway Law § 340-c, as amended (McKinney's Consol. 1966), reads in pertinent part:

> Beginning at a point on interstate route 503 in the vicinity of Beacon or Wiccopee, to be determined by the superintendent of public works [now the Commissioner of Transportation], thence in a generally southerly direction to the vicinity of Ossining and thence continuing southerly, west of U. S. route nine, along or near the Hudson River to a connection or connections with existing highways, as determined by the [Commissioner of Transportation] in the vicinity of the structure on the Governor Thomas E. Dewey Thruway known as "The Tappan Zee Bridge."

Appendix "A".

I.

The district court rested its jurisdiction on the Administrative Procedure Act, U.S.C. §§ 701 et. seq. (Supp. IV). Section 702 provides as follows: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Section 704 states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Section 706(2)(C) permits the reviewing court to set aside agency action found to exceed the agency's statutory authority.

The statute, pursuant to which the Army Chief of Engineers issued the disputed permit contains no provision for judicial review, nor does it include specific procedures for appeal of the Army's decision. Review of the action is therefore determined by the provisions of the Administrative Procedure Act, applicable to all administrative actions or proceedings "except to the extent that: (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (Supp. IV). Nothing in the Rivers and Harbors Act suggests that judicial review is precluded, and it is clear from a reading of § 401 that approval of projects involving the construction of "dikes" and "causeways," rather than being "committed to agency discretion by law," was, on the contrary, expressly reserved to Congress. The federal defendants contend that the landfill permit was governed by § 403, committing certain types of shoreline construction to the Army's discretion. But whether or not the Army could exercise its authority under § 403 without reference to § 401 was a matter of statutory construction obviously subjected to full review in the district court by the Administrative

Procedure Act, 5 U.S.C. § 706. The district court properly relied on the presumption of reviewability embodied in the Administrative Procedure Act where there was no evidence of a congressional intent to prohibit review in the Rivers and Harbors Act. As the Supreme Court has twice held "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967); accord, *Rusk* v. *Cort*, 369 U.S. 367, 379-380 (1962); *Kletscha* v. *Driver*, 411 F.2d 436 (2d Cir. 1969); *Cappadora* v. *Celebrezze*, 356 F.2d 1 (2d Cir. 1966).

There can be no question at this late date that Congress intended by the Administrative Procedure Act to assure comprehensive review of "a broad spectrum of administrative actions," including those made reviewable by specific statutes without adequate review provisions as well as those for which no review is available under any other statute. *Abbott Laboratories* v. *Gardner*, *supra* at 140; *see* S. Rep. No. 752, 79th Cong. 1st Sess., 26 (1945); H. R. Rep. No. 1980, 79th Cong. 2d Sess., 41 (1946). Since the Army's issuance of this permit was final agency action for which there is no other adequate remedy in a court, and review is not clearly and convincingly precluded by the Rivers and Harbors Act, the Administrative Procedure Act must be read to confer equitable jurisdiction on the district court to protect by injunctive relief such rights as the plaintiff may have standing to assert. *Kletscha* v. *Driver*, 411 F.2d 436, 445 (2d Cir. 1969). In our discussion of standing, *infra*, we conclude that these plaintiffs are "aggrieved by agency action within the meaning of a relevant statute" and are therefore entitled to review. The district court has the power under § 706 to set aside agency action in excess of statutory authority, and we agree with the district court that issuance of the permit here exceeded the Army's au-

thority. Under these circumstances, if the Administrative Procedure Act could not itself serve as a basis for jurisdiction, the important goal of subjecting final agency action to judicial scrutiny would be frustrated. We therefore conclude that the district court properly assumed jurisdiction.

II.

Reference was likewise made to the Administrative Procedure Act to determine the plaintiffs' standing to obtain review. Their right to review was based on the Act's provision that "[a] person suffering legal wrong or . . . aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Two of the plaintiffs (the Citizens Committee and the Sierra Club) made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were "aggrieved" when the Corps acted adversely to the public interest. They are, as the federal defendants observe, serving as "private Attorney Generals" to protect the public interest. See *Associated Industries of the State of New York* v. *Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

Allowance of standing to private attorneys general in "public actions"[3] challenging administrative activity is by no means a new or unusual concept. See *Associated Industries* v. *Ickes, supra; Office of Communication of United*

[3] See generally L. Jaffe, Judicial Control of Administrative Action 459-500 (1965); K. Davis, Administrative Law § 22.05 (1958).

Church of Christ v. *F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966); *Reade* v. *Ewing*, 205 F.2d 630 (2d Cir. 1953); cf. *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4 (1942); *F.C.C.* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940). It is significant that standing in such cases has derived from judicial interpretation of the statutory term "aggrieved" as descriptive of persons entitled to review. Thus under the Federal Communications Act, where agency action assertedly contravened the public interest, private litigants were held to be "persons aggrieved" with standing "only as representatives of the public interest." *Scripps-Howard Radio, Inc.* v. *F.C.C.*, *supra* at 14; L. Jaffe, Judicial Control of Administrative Action, 499 (1965).

The Supreme Court has observed that the law of standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations. . . ." *U. S. ex rel. Chapman* v. *F.P.C.*, 345 U.S. 153, 156 (1953). Judge (now Chief Justice) Burger, in his *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra*, opinion characterized the concept of standing as "a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding. . . ." *Id.* at 1002.[4] But the Supreme Court has recently cautioned that "[t]here must in addition [to adversary interest] be some connection between

[4] In *Church of Christ*, a citizens group pressing an organized protest against renewal by the FCC of a radio broadcasters license, alleging that the broadcaster had ignored the listening needs of nearly half the listening audience, was held to have standing before the Commission as a group representative of broadcast "consumers." Judge Burger treated the question of standing before the Commission as equivalent to standing for judicial review, 359 F.2d at 1000 n. 8, and cited as authority for his grant of standing to members of the general public, *inter alia*, *Scenic Hudson Preservation Conf.* v. *F.P.C.*, 354 F.2d 608 (2d Cir. 1965).

the official action challenged and some legally protected interest of the party challenging the action." *Jenkins* v. *McKeithen*, 395 U.S. 411, 423 (1969). With these principles in mind, we must examine the nature of the interest these plaintiffs are seeking to protect, and the appropriateness of their claim to represent the public in demanding that protection.

We have already described the situation confronting the plaintiffs—the prospect of massive alteration of the Hudson River shoreline and of the physical environment for some ten miles along the river's bank. The Citizens Committee for the Hudson Valley (Citizens Committee) is an unincorporated association of citizens who reside near the proposed Expressway. The Sierra Club is a national conservation organization with substantial membership also in the area of the Expressway, and a history of involvement in the preservation of national scenic and recreational resources. Tarrytown is an incorporated village, and the planned Expressway would pass through its boundaries at the southern end of the roadway. All plaintiffs made a vigorous effort to present their views to the New York Department of Transportation and to the federal officials responsible for granting the disputed permit. They have evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened by official action of the federal and state governments. In short, they have proved the genuineness of their concern by demonstrating that they are "willing to shoulder the burdensome and costly processes of intervention" in an administrative proceeding. *United Church of Christ, supra* at 1005. They have "by

their activities and conduct . . . exhibited a special interest in" the preservation of the natural resources of the Hudson Valley. *Scenic Hudson Preservation Conf.*, 354 F.2d 608, 616 (2d Cir. 1965). It remains for us to examine whether there is legal justification for their intervention—whether there is a "legally protected interest" at stake which they can assert because of their special concern.

In *Scenic Hudson*, *supra*, we set aside an order of the Federal Power Commission granting a license to Consolidated Edison Company of New York to construct a hydroelectric project on the west side of the Hudson River at Storm King Mountain. Finding that the Federal Power Act required the Commission to consider as a factor in granting such a license "recreational purposes" of waterway development,[5] we held that persons asserting an interest in that factor were "aggrieved" within the meaning of that statute's review provisions when the Commission decided adversely with respect to their claims.[6] The expression by Congress in the Federal Power Act of a concern for the environmental effect which the agency's action could be expected to exert was interpreted to create express

---

[5] Federal Power Act § 10(a), 16 U.S.C. § 803(a) reads in part: All licenses issued . . . shall be on the following conditions: (a) That the project adopted . . . shall be such as in the judgment of the Commissioner will be best adopted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interestate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; . . .

[6] The pertinent review provisions are contained in section 313(b) of the Federal Power Act, 16 U.S.C. § 8251(b):

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the license or public utility to which the order relates is located . . .

statutory protection for the public's interest in conservation of environmental resources, and organizations with a demonstrated concern for those resources could claim that statutory protection for the public.

The Rivers and Harbors Act has no review provisions corresponding to those in the Federal Power Act. Nevertheless, persons "aggrieved" by agency action pursuant to that statute are entitled to review on similar terms by the Administrative Procedure Act. We agree with the conclusion of Judge McLean in *Road Review League* v. *Boyd*, 270 F. Supp. 650, 661 (S.D.N.Y. 1967) that the meaning of "aggrieved" in one act is not different from its meaning in the other.[7] Section 702 of the Administrative Procedure Act provides that a person "aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." These plaintiffs, alleging that the Corps and the Secretary of the Army ignored their environmental concerns are "aggrieved" within the meaning of at least three "relevant statute[s]." The Department of Transportation Act[8] declares "the national policy that special effort should be made to preserve the natural beauty of the countryside . . ." and requires consideration of recreational resources and historical values before the

---

[7] The defendants concede that the *Road Review* decision, if correct, is controlling here. *Road Review* was decided under the Federal Highways Act, 23 U.S.C. § 101 *et seq.* which, like the Rivers and Harbors Act, contained no review provisions. Judge McLean relied on the Administrative Procedure Act to find both jurisdiction over the subject matter and standing for the plaintiffs, among whom were non-profit civic organizations and a town, for practical purposes identical to the plaintiffs in the present case. As our present decision makes clear, we believe Judge McLean's decision in *Road Review* was correct.

[8] Department of Transportation Act of 1966, as amended by § 18(b) of the Act of August 23, 1968, 82 Stat. 824, 49 U.S.C.

(*footnote continued on following page*)

Secretary can approve projects under its jurisdiction. The Hudson River Basin Compact Act, P.L. 89-605, 80 Stat. 847 (1966) embodies the conclusion of Congress that the Hudson River basin contains resources of "immense economic, natural, scenic, historic and recreational value to all the citizens of the United States," and instructs all agencies to consider those resources in planning or approving activities affecting the area. One of the regulations under which the Corps of Engineers issued the present permit provides the following:

> . . . the decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish, and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest.
>
> 33 CFR 209.120(d).[9]

(*footnote continued from previous page*)

§ 1653(f) (Supp. IV). The merits of the plaintiffs' claims are entwined with their standing to maintain them. One of their contentions was that a portion of the proposed expressway constituted a causeway and, therefore, that the Corps erred in failing to secure the consent of the Secretary of Transportation pursuant to the Department of Transportation Act. Since we are in agreement with the district court that the plans for the expressway did envision the construction of a causeway, see *infra*, the Department of Transportation Act is a "relevant" statute; and the concern it evidences for preservation of the environment serves to reinforce our decision that the plaintiffs have standing to maintain this action.

[9] See also Fish and Wildlife Coordination Act of 1934, as amended, 16 U.S.C. § 662(a); Fish and Wildlife Act of 1956, as amended, 16 U.S.C. § 742a *et seq.*; *Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army*, 33 CFR 290.120(d)(11). Claims relevant to most of these factors were advanced by the plaintiffs throughout the proceedings in connection with their contention that issuance of the permit was "arbitrary and capricious." The district court did not reach the "arbitrary and capricious" claim in deciding for the plaintiffs, and we need not consider it here.

Thus administrative as well as congressional concern for natural resources in the present exercise of federal autority is evident. We hold, therafore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest. *Scenic Hudson Preservation Conf.* v. *F.P.C. supra; State of Washington Dept. of Game* v. *F.P.C.*, 207 F.2d 391 (9th Cir. 1953); *Road Review League* v. *Boyd, supra.*

III.

The federal defendants challenge the standing of the Village of Tarrytown on a somewhat different ground. Conceding that the Village may have standing to challenge construction of the Expressway itself,[10] they contend that issuance of the fill permit could not have a direct effect on the Village and therefore no standing exists to challenge the permit. This argument ignores the realities confronting the Village of Tarrytown. It is true that the Corps of Engineers cannot affirmatively control the entire Expressway project, as the Federal Power Commission controlled the project at issue in *Scenic Hudson*, and that all that is required of the Corps is "acquiescence" in parts of the State's proposed construction. Nevertheless, federal acquiescence in the project would spell immediate jeopardy to substantial interests of the Village, because

---

[10] The district court found that the Village of Tarrytown would suffer "loss of tax revenues and interference with the Urban Renewal project already in progress in the Village." 302 F.Supp. at 1092. See *Scenic Hudson Preservation Conf.* v. *F.P.C.*, 354 F.2d at 616.

once the permit issues, the State of New York can commence the costly dredging and filling operation and proceed inexorably on the course of highway construction to which the Village objects. The Village would be hard put at some later date to overbalance the equities in favor of the State such a large commitment of public funds would engender and its legitimate concern could be irretrievably subverted even though the permit was issued unlawfully. Although the fill itself will not have a significant direct effect on the special interests demonstrated by Tarrytown, the effect of the permit will have a substantial impact. Without the permit, New York cannot begin construction of the Expressway along the presently planned route. With it, condemnation proceedings and construction can commence all along that route. We think the concept of standing is sufficiently "practical and functional" to permit Tarrytown to take advantage of federal remedies to avoid the substantial impact of the consequences flowing from issuance by federal agencies of the disputed permit.

IV.

We turn now briefly to the merits of the controversy. After 29 days of trial, during which numerous exhibits were offered (including a model of the proposed Expressway), experts were examined, maps, charts and technical dictionaries were consulted and the facts were exhaustively presented, the district court concluded that construction of both a "dike" and a "causeway" were contemplated by the State. The court was called upon to construe the meaning of those terms as they were used in § 401 of the Rivers and Harbors Act of 1899, and as they applied in fact to the Expressway plans before it. Having carefully reviewed the pertinent evidence and con-

sidered the governing rules of statutory construction, we adopt the conclusion of the district court that the word "dike" used by the defendants in their permit has the same meaning there as in § 401 of the Act, and that construction of a dike is forbidden by that Section without the consent of Congress.

We likewise agreed that the Corps of Engineers should not have ignored the prospect that a "causeway" within the meaning of § 401 was to be a part of the project it was approving, and that approval of the Secretary of Transportation would later be required. Any further federal role in consideration of this massive project would be effectively foreclosed by the Army's acquiescence in a 9.5 million cubic-yard landfill, to be undertaken at great expense to the New York taxpayers. Indeed Congress, which also must approve construction of a causeway over navigable waters, would, in practical effect, be precluded from reversing such a course of action already begun pursuant to the present permit issued by the Army.

V.

The district court held that the plaintiffs' constitutional claims were without merit, and we agree. As we understand their argument, three separate delegations of power to McMorran combine to constitute in their view, an abdication of legislative responsibility in construction of this Expressway. The Expressway law itself is an eight-line statute[11] describing generally the terminal points and route of the highway and prescribing that, between Ossining and the Tappan Zee Bridge, the roadbed is to proceed west of Highway 9 and "along or near" the Hudson River. Second, section 30 of New York's Highway Law

---

[11] Note 2, *supra*.

allows McMorran to condemn property needed for highway construction, and sets forth the procedures to be followed in condemnation. These procedures are themselves challenged as violative of due process. Third, the legislature's lump sum appropriation for highway construction to the Department of Transportation permits McMorran considerable latitude in deciding how the highway money is to be spent. The plaintiffs argue that, with all the discretion over condemnation of property, expenditure of funds and fixing of routes afforded to McMorran by this combination of legislation, the "aggregation of power" vested in him violates the citizens' right to due process.

On this appeal, the plaintiffs have not developed the facts or the law sufficiently to be persuasive. The Expressway statute certainly offers very little guidance for major decision which the Department of Transportation is authorized to make. McMorran cites a bevy of regulations, as does the district court, as restrictions on this power, but few of them appear to be relevant to these major decisions. Thus the statute itself sets the bounds of McMorran's discretion, which is very broad. However, nullification of statutory delegations of discretionary authority in major public works projects on grounds of due process is quite rare, and the plaintiffs offer virtually no authority for judicial intervention along the lines they propose. Indeed authorities closest in point are to the contrary. See *Ahoyian* v. *Massachusetts Turnpike Authority*, 211 F. Supp. 668, 669 (D. Mass.), *aff'd*, 371 U. S. 106 (1962); *Sleepy Hollow Valley Commission* v. *McMorran*, 20 N. Y. 2d 190, 195-97 (1967); cf. *Seneca Nation of Indians* v. *United States*, 338 F. 2d 55 (2d Cir. 1964). We agree with the district court that these claims must be rejected.

Affirmed.

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of April one thousand nine hundred and seventy.

Present: HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN, Circuit Judges.
HON. SYLVESTER J. RYAN, District Judge.

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, THE SIERRA CLUB AND THE VILLAGE OF TARRYTOWN, NEW YORK,

Plaintiffs-Appellees,

against

JOHN VOLPE, Individually and as Secretary of Transportation of the United States, et al.,

Defendants-Appellants,

J. BURCH MCMORRAN, Individually and as Commissioner of the Dept. of Transportation of the State of N. Y.,

Intervenor-Appellant.

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, THE SIERRA CLUB AND THE VILLAGE OF TARRYTOWN, N. Y.,

Plaintiffs-Appellants,

against

J. BURCH MCMORRAN, Individually and as Commissioner of the Dept. of Transportation of the State of N. Y.,

Defendant-Appellee.

Judgment of Affirmance.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

JUDGMENT ENTERED 6/3/70.

JOHN LIVINGSTON,
Clerk.

APPENDIX "B"

Decision of District Court, Murphy, D.J., dated July 11, 1969.

MURPHY, D.J.:

These four actions, consolidated for trial, challenge the construction of the proposed Hudson River Expressway on a variety of grounds.

The Citizens Committee for the Hudson River Valley is an unincorporated association of citizens who reside in the area of the proposed Expressway. The Sierra Club is a non-profit conservationist corporation organized in California with various chapters throughout the United States. Tarrytown is an incorporated village of New York State, and one of the communities through which the Expressway will pass.

The federal defendants are public officials charged with certain statutory duties related to the issues involved and the defendant, J. Burch McMorran, is the Commissioner of the Department of Transportation of the State of New York, the builder of the proposed Expressway.

The Expressway, as proposed by the New York State Department of Transportation, is planned to be a six lane arterial highway which will accommodate both passenger and commercial traffic. As conceived it will extend approximately nine miles along the east shore of the Hudson River from the Tappan Zee Bridge at Tarrytown north to Crotonville, New York. Approximately 22,000 feet of the road will rest on 9,500,000 cubic yards of fill which will extend at its widest point 1300 feet into the river. No part of the project will involve the expenditure of federal funds.

On February 21, 1968, the State Department of Transportation, pursuant to 33 U.S.C. § 403 (Rivers and Harbors Act of 1899), applied to the Corps of Engineers for a permit authorizing the fill operation which would take approximately two years to complete. When the permit was authorized by the Secretary of the Army and issued by the Corps on January 27, 1969, the plaintiffs sought

a preliminary injunction restraining its delivery. This relief was denied, *Citizens Committee* v. *Volpe*, 297 F. Supp. 804 (S.D.N.Y. 1969), and the Court of Appeals affirmed. —— F. 2d —— (2d Cir. 1969)[1] but ordered an immediate trial on the merits.

The plaintiff's major claim is that since the Expressway project involves *dikes, causeways and bridges* to be built over or in a navigable waterway of the United States, the Corps exceeded its statutory authority in issuing the permit without the prior approval of Congress and/or the federal Department of Transportation, as required by 33 U.S.C. § 401 of the same Rivers and Harbors Act of 1899. Section 403, under which the Corps issued the permit provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited . . . and it shall not be lawful to excavate or fill [in a navigable waterway of the United States] . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U.S.C. § 403 (1899).

Section 401, claimed by the plaintiffs to be applicable, provides:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway,

---

[1] In *Citizens Committee* v. *Volpe*, 297 F. Supp. 809, which granted New York State's motion to dismiss the actions against it on the ground of sovereign immunity, the plaintiffs' claims against McMorran were restricted to whether "[s]ection 340c of the New York Highway Law is unconstitutional in that it violates the Fourteenth Amendment and [is the construction of] the Expressway . . . a violation of their Fifth Amendment rights." 297 F. Supp. at 814.

> over or in any port, roadstead, haven, harbor, canal, navigable river . . . of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army. . . .'' 33 U.S.C. § 401 (1899).

The needed approval of the Secretary of Transportation of the United States becomes a factor in the case as a result of the evolution of section 401. By two subsequent statutes "bridges" were removed from the specific consent of Congress requirement. In 1946 Congress enacted the General Bridge Act, 33 U.S.C. § 525 et seq. Section 525 of this Act grants the consent of Congress for the construction of any bridge over navigable waters if the bridge is approved by the Chief of Engineers and the Secretary of the Army. However, Congress still reserved its jurisdiction over dikes and causeways referred to in section 401 of Title 33. In 1966 Congress enacted the Department of Transportation Act, 49 U.S.C. § 1651 et seq. Section 1655 of that Act transferred certain powers and duties of other federal departments to the Secretary of Transportation. Subsection (g) of that section transferred jurisdiction over bridges and causeways in navigable waters of the United States from the Secretary of the Army to the Secretary of Transportation.

Consequently, the construction of a bridge over or in navigable waterways now requires approval of the Corps of Engineers acting under the Secretary of the Army, and the Secretary of Transportation; the construction of a dike requires the consent of Congress and the Corps of Engineers when authorized by the Secretary of the Army; the construction of a causeway requires the consent of

Congress and the approval of the Secretary of Transportation.

Since the Corps of Engineers as authorized by the Secretary of the Army issued the permit without the consent of Congress or the Secretary of Transportation, it exceeded its statutory authority if there is a bridge, dike, or causeway involved in the permitted project. We come, therefore, to what is the most crucial issue in the case.

It is undisputed that the Hudson River is a navigable waterway of the United States, and that in both the permit issued by the Corps, and the New York State plans accompanying the permit there are numerous references to "dikes." Page 1 of the Permit states: "you are hereby authorized by the Secretary of the Army to dredge and place fill protected by stone slope protection and to construct piers and bulkheads with floats and mooring piles; the dredged material to be suitably *retained by dikes* to prevent its return into the waterway. . . ." (Emphasis added.) In the State plans or drawings attached to the permit there are four references to stone and/or rock dikes.

In the plans prepared by the State in connection with the securing of bids, three types of dikes are specifically illustrated and described. The main type, the rock dike, will run along the entire length of the western side of the fill in order to prevent the fill from returning to the river.

The defendants, while accusing the plaintiffs of arguing semantics, postulate that what is called a dike (by the various engineers who prepared the plans for the State Department of Transportation, and the Corps of Engineers) is not really a dike since a real dike has a different purpose from their dikes. They also argue, assuming dikes are involved, that section 401 is still not applicable since their dikes would not substantially affect navigation. The

court in denying the preliminary injunction agreed with this latter argument reasoning that the plaintiffs would probably not succeed on the merits because the Expressway would not substantially interfere with navigation and because the federal Department of Transportation interposed no objection.[2] The Court of Appeals in affirming the denial of the temporary injunction did not pass on this issue.

The defendants urge that Congress, in using the term "dike" in 1899, meant a structure that would be within the definition set forth in Chambers Technical Dictionary, p. 273 (3d Rev. ed. with Supp. 1958), which was originally published in 1940, i.e., "a wall or embankment of timber, stone, concrete, fascines, or other material, built as a training works for a river so as rigidly to confine flow within definite limits over the length treated." From this definition they conclude that a real dike must substantially affect navigation since it confines river flow, and since the dikes in their plans do not substantially affect navigation they are not dikes as Congress used the term.

The plaintiffs submit that Congress, in prohibiting "any dike" reserved for itself the determination of the effect of the dike on navigation and any other matter deemed of consequence. Therefore, they argue, that once a dike, any dike, is to be constructed in navigable water of the United States it is Congress, and not the courts, who will consider its effects on navigation in determining whether to approve the structure or no.

---

[2] The denial of the plaintiffs' motion for a preliminary injunction does not affect our final determination of the issues. *Harvey Aluminum Co.* v. *American Cyanamid Co.*, 15 F.R.D. 14 (S.D.N.Y. 1953); 7 J. Moore, Federal Practice § 65.21 (2d ed. 1953).

Decision of District Court, Murphy, D.J., dated July 11, 1969.

What is posed, therefore, is are there dikes involved in this project and what did Congress mean when it legislated, "it shall not be lawful to construct or commence the construction of *any bridge, dam, dike or causeway* over or in any . . . navigable river . . . until the consent of Congress to the building of such structure shall have been obtained. . . ."

We hold, based on the evidence presented at trial, that "dikes," characterized as such by the defendants, are to be constructed along the western side of the fill and that Congress when it said "any dike" over or in any navigable river meant exactly that. Therefore, the Corps of Engineers exceeded its statutory authority in issuing the permit which enables the State to commence advertising for bids.

In the absence of any legislative or judicial authority to support the defendants' theory of statutory interpretation we apply the ordinary meaning to the term "any dike." Dike is defined as "[a] bank, as of earth, thrown up to form a barrier, line of demarcation or the like. . . ." Webster's New International Dictionary, 2d Ed., p. 730 (1954); "An embankment for controlling or holding back the waters of the sea or a river." Random House Dictionary of the English Language, p. 403 (1967). "Statutes are to be construed by attributing its ordinary meaning to the language used." *United States v. Peller*, 170 F. 2d 1006, 1007 (2d Cir. 1948). Consequently, we hold that if Congress meant to confine its jurisdiction to only those dikes that substantially affect navigation, it would have said so. Since proposed dikes are involved and will be "over or in" a navigable river of the United States, we leave to Congress, when it decides if it will approve the project, the consideration of the effect of the dikes on navigation.

Even if this interpretation is incorrect we find that the proposed rock dikes come within the definition proposed by the defendants, i.e., the rock dike will control the flow of the river insofar as it will prevent the river from eroding the fill and returning to the natural shore line. It will also, according to a government expert, increase the force of the ebb tide by 10 percent.

In addition to the consent of Congress being required because of the presence of dikes, we hold that approval of the Secretary of Transportation of the United States is required since causeways are also involved in the construction of the project.

The plaintiffs claim that the entire fill area of the project will be a causeway since it will be support for a raised road over water. We disagree and accept the defendants' definition of a causeway, i.e., its ordinary meaning connotes a raised road across water or marshy land with the water or marshy land on both sides of the road. Since the fill will be bounded by water on only one side (the west, it, in itself, is not a causeway.

However, the proof at trial clearly shows a causeway supporting the road where it leaves the natural shore line south of the Tappan Zee Bridge until the road reaches the southernmost point of the fill. On the map, opposite page 14 of the booklet "The Hudson River Expressway and the Hudson River Expressway Park," which was published by the State Department of Transportation, the southern lane of the Expressway at this point is clearly out in the river with water on both sides. The detailed model of the project, which was introduced into evidence by the State, also shows this portion of the Expressway to clearly be a causeway within the definition urged by the defendants.

Decision of District Court, Murphy, D.J., dated July 11, 1969

While this causeway is not per se part of the fill project which the Corps of Engineers' permit authorized, we hold that the Corps still had the obligation to consider it and recognize its reality before issuing the permit.

The Corps in considering the application of the State was not operating in a vacuum. It had before it detailed maps, drawings and plans of the entire project. It certainly knew the entire route of the six lane road. Before it issued the permit the Corps of Engineers held public hearings at which time a full description of the project and the route of the road was given. By not securing the approval of the United States Secretary of Transportation on the causeway it was in effect delaying the inevitable by requiring the State, after it had expended millions of dollars in filling the river with 9,500,000 cubic yards of fill, to then apply for the Secretary's approval of the causeway which is immediately south of the fill. By doing so the Corps effectively relinquished the jurisdiction of the federal Department of Transportation, and its discretion to deny the approval of the future causeway, for how could the Secretary of Transportation deny the future request, if he were to be so inclined, after the enormous expense and work the State would have had already put into the project.

Such a piecemeal approach to the exercise of federal agency jurisdiction would also frustrate one of the main purposes of the Department of Transportation Act, i.e., the conservation of the country's natural resources.[3] Before the Secretary of Transportation is to approve any

[3] "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and water fowl refuges, and historic sites." 49 U.S.C. § 1651(b)(2) (1966).

project within his jurisdiction he has to determine, *inter alia*, the effects of the project on the natural resources of the area.[4] If this massive fill project is completed before his approval is sought, he will be presented with a *fait accompli*. There will not be any need for him to consider the effects on natural resources as the harm, if any, will be done.

In view of this congressional intent encompassed in the Department of Transportation Act we hold that the Corps of Engineers exceeded its statutory authority in ignoring the presence of the causeway[5] when it issued the permit without prior approval of the Secretary of Transportation.[6]

---

[4] "After August 23, 1968, the Secretary shall not approve any programs or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and, (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 49 U.S.C. § 1653(f).

"The Hudson River Expressway and the Hudson River Expressway Park," published by the New York State Department of Transportation, states "The setting within which these complementing projects are to be undertaken is characterized by striking natural beauty, important historical significance, and harmonious residential development" (at page 1).

[5] Since the presence of causeways in the project necessitates the approval of the Secretary of Transportation, we have not deemed it necessary to determine if bridges are present.

[6] Since the Corps of Engineers has exceeded its statutory authority within the meaning of 5 U.S.C. § 706(2)(C) (1966), we have not deemed it necessary to determine if the Corps was also arbitrary and capricious within the meaning of § 706(2)(A) of Title 5. See note 7, *infra*.

Decision of District Court, Murphy, D.J., dated July 11, 1969.

The defendants have consistently urged that this court has no jurisdiction over the subject matter of this dispute. Concededly there is no separate statutory authority which grants jurisdiction to the district courts to have a decision of the Secretary of the Army reviewed. Yet, we hold that the Administrative Procedure Act, 5 U.S.C. § 701 et seq., justifies this Court's jurisdiction.[7]

While there is an apparent conflict in this circuit, the Supreme Court has implemented what appears to be a presumption in favor of a finding of jurisdiction under the Administrative Procedure Act. In *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967), it was held that the courts should restrict access to judicial review "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent. . . ." 387 U. S. at 141, citing *Rusk* v. *Cort*, 369 U. S. 367 (1962). See also, *Powelton Civic Home Own. Ass'n* v. *HUD*, 284 F. Supp. 809 (E. D. Pa. 1968).

---

[7] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

"The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . ." 5 U.S.C. § 706.

Decision of District Court, Murphy, D.J., dated July 11, 1969.

A 1966 decision in this circuit held that the Administrative Procedure Act constituted an affirmative grant of jurisdiction with respect to the review of federal administrative actions. *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (2d Cir. 1966). Judge McLean in *Road Review League* v. *Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967), followed the reasoning of *Cappadora* and referred to the Administrative Procedure Act as a "jurisdictional statute." 270 F. Supp. at 659.

A second circuit case that appears to hold, and has later been construed to hold,[8] that the Administrative Procedure Act does not confer jurisdiction is *Ove Gustavsson Contracting Co.* v. *Floete*, 270 F. 2d 912 (2d Cir.), cert. denied, 364 U. S. 894 (1960). The court held in that case that the suit, while termed one for judicial review, was in reality a contract action against the United States and properly belonged in the Court of Claims. It went on to say that the Administrative Procedure Act does not extend the jurisdiction of the federal courts to cases not otherwise within their competence. Even though the court stated that the Act does not grant jurisdiction, it never had to reach that determination since there was really no agency action to be reviewed.

Since the presumption in favor of jurisdiction has not been rebutted by a clear and convincing presentation of an opposite legislative intent, we hold that this court has the necessary jurisdiction to rule on the dispute under the Administrative Procedure Act.

This court also has jurisdiction of the suit brought by the Village of Tarrytown under the federal question statute

---

[8] *National Maritime Union* v. *NLRB*, 267 F. Supp. 117, 119 at N. 8 (S.D.N.Y. 1967).

which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1958).

The Village's claim is that it will lose tax revenues by the State condemnation of taxable property in the Village. In *Scenic Hudson Preservation Conf.* v. *FPC* 354 F. 2d 608 (2d Cir. 1965), cert. denied, 384 U. S. 941 (1966), the same claim was the basis of one of the petitioners' standing to sue. See also, *TVA* v. *Polk County*, 68 F. Supp. 692 (E. D. Tenn. 1945). Cf. *Jacobs* v. *Tawes*, 250 F. 2d 611 (4th Cir. 1957); *Denton* v. *City of Carrollton*, 235 F. 2d 481 (5th Cir. 1956).[9]

We also hold that all of the plaintiffs have standing necessary to maintain these actions. Under *Scenic Hudson, supra*, there is little doubt that the Village of Tarrytown has the necessary standing. There the court held, "The towns that are co-petitioners with Scenic Hudson have standing because the transmission lines . . . reduce tax revenues collected from privately held land, and significantly interfere with long-range community planning." 354 F. 2d at 616.

This is precisely what was proved by the Village in the instant case, namely, loss of tax revenues and interference with the Urban Renewal project already in progress in the Village. The proof offered by the Village of Tarrytown

---

[9] Since jurisdiction has been established under the Administrative Procedure Act and the Federal Question statute, we do not determine if jurisdiction exists under the Mandamus Act (28 U.S.C. § 1361), the Commerce and Anti-Trust Statute (28 U.S.C. § 1337); or the Declaratory Judgment Act (28 U.S.C. § 2201).

that it would lose over $10,000 in tax revenues contained some errors in computation. Nevertheless, this court is satisfied that the amount will at the very minimum exceed $10,000.

The standing problem becomes more acute with the Sierra Club and the Citizens Committee as they admittedly have no personal economic claim to assert. Rather they are "aggrieved" by the alleged destruction of the natural resources of the river. *Scenic Hudson, supra*, and its interpretation by *Road Review, supra*, create standing in this case if this court can find a "legislative intent" to create standing, absent a monetary claim, in the various statutes involved.

Scenic Hudson involved the Federal Power Act (16 U.S.C. § 791 et seq.). Section 313(b) of that Act (16 U.S.C. § 825L(b)) grants the right of judicial review to any party aggrieved by an order of the Federal Power Commission. The main petitioner was an unincorporated association consisting of a number of non profit conservationist organizations. Like the Sierra Club and the Citizens Committee in this case, they had no direct economic interest in the controversy. Yet, they were found to be "aggrieved parties" because the Federal Power Act was held to create a public interest in the scenic, historical, and recreational values of the area. The Court held:

> "In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be . . . aggrieved parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interest." 354 F. 2d at 616.

Decision of District Court, Murphy, D.J., dated July 11, 1969.

The *Road Review* case involved a dispute under the Federal Highways Act (23 U.S.C. § 101 et seq.). Again, there was no economic loss on the part of the conservationist plaintiffs. Unlike the Federal Power Act, the Federal Highways Act contained no specific authorization for judicial review. Instead the plaintiffs relied on the Administrative Procedure Act. The Court, following the reasoning of *Scenic Hudson*, cited sections of the Highways Act (23 U.S.C. §§ 134, 138) and 23 C.F.R. § 1.6(c), all to the effect that administrative decisions under the Act must consider local needs, parks, historic sites and natural resources. 270 F. Supp. at 660-61. The court stated that these provisions were "sufficient, under the principles of *Scenic Hudson*, to manifest a congressional intent that towns, local civic organizations, and conservation groups are to be considered 'aggrieved' by agency action which allegedly has disregarded their interests. I see no reason why the word 'aggrieved' should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act." 270 F. Supp. at 661.

The rule, therefore, is that if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.[10]

[10] After the plaintiffs had rested, the State moved unsuccessfully to dismiss since the plaintiffs had introduced no evidence to show their interest in the natural, historic, and scenic resources of the area and hence had failed to prove their standing. During the State's case this interest was proved through the testimony of members of the Citizens Committee and Sierra Club. We base our decision that plaintiffs Citizens Committee and Sierra Club have standing based on the evidence as a whole, including that introduced by the defendant New York State. *Bates* v. *Miller*, 133 F.2d 645 (2d Cir.), cert. denied, 320 U. S. 210 (1943); 9 Wigmore, On Evidence § 2496 (3d ed. 1940).

Decision of District Court, Murphy, D.J., dated July 11, 1969.

In the instant case the Department of Transportation Act manifests the same congressional concern.[11] One of the regulations under which the Corps of Engineers issued the permit, 33 C.F.R. § 209.330, calls for the consideration of the effects of the permit on fish, recreation, pollution, and natural resources as well as navigation.[12]

Therefore, under the guidelines of *Scenic Hudson* and *Road Review* both the Sierra Club and the Citizens Committee have the requisite standing to maintain these actions.

The remaining claim of the plaintiffs is that McMorran as a State official is proceeding under an unconstitutional statute, i.e., 340c of the New York Highway Law, in violation of the Fifth and Fourteenth Amendment rights of the plaintiffs and, accordingly, should be enjoined. See note 1, *supra*.

The plaintiffs' brief characterizes the claim as follows: "Whether Article VII (New York State Constitution) has been violated is perhaps not a question before this court. The extent of the power granted to McMorran by the Expressway Law, § 30 of the Highway Law, and the Legislature's lump sum budgets is of the essence of the constitutional claim."

Section 340c of New York Highway Law (McKinney's 1965), which authorizes construction of the Expressway provides:

> "State expressway routes are hereby set forth and generally described as follows. . . ."

---

[11] See notes 3 and 4 *supra*.

[12] Public Law 89-695, 80 Stat. 847 (1966) states that the Hudson River basin contains resources of "immense economic, natural, scenic, historic, and recreation value to all the citizens of the United States. . . ."

Decision of District Court, Murphy, D.J., dated July 11, 1969.

> "Beginning at a point on interstate route 503 in the vicinity of Beacon or in the vicinity of Wiccopee, to be determined by the superintendent of public works, thence in a generally southerly direction to the vicinity of Ossining and thence continuing southerly, west of U. S. route nine, along or near the Hudson River to a connection or connections with existing highways, as determined by the superintendent of public works, in the vicinity of the structure on the Governor Thomas E. Dewey Thruway known as 'The Tappan Zee Bridge'."

The plaintiffs claim this statute is an unconstitutional delegation of legislative power to the Commission in that it prescribes no standards to be followed in determining, *inter alia*, the exact route, width or nature of the Expressway. We disagree. To require a State legislature to prescribe every detail of a proposed State road, would shortly put an end to road construction on a State level. In *Aboyian* v. *Massachusetts Turnpike Authority*, 211 F. Supp. 668, 669 (D. Mass.), aff'd, 371 U. S. 186 (1962), it was held that the delegation of the exact path of a highway was not unlawful. The "'[l]egislature cannot constitutionally (be) required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel (the Legislature) to prescribe detailed rules.'" *City of Utica* v. *Water Pollution Control Board*, 5 N. Y. 2d 164, 169 (1959), citing *American Power Co.* v. *SEC*, 329 U. S. 90.

Moreover, the Commissioner of Transportation, when implementing section 340c of the Highway Law, is bound by the procedures and standards set forth by the New York State Legislature in section 340d of the Highway

Law. This latter section provides for, *inter alia*, the number and separation of lanes, access to the expressways and their maintenance. Sections 10 and 11 of the Highway Act mandate that the Commissioner make surveys, maps and plans in connection with the construction of roads. Before the Commissioner awards any construction contract, he must follow the procedures prescribed by the Legislature in section 38 of the Highway Law. In short, the Commissioner is not operating solely under section 340c. Rather, he is bound by the many regulatory provisions contained in the entire Highway Law of New York.

We also hold that failure to give prior notice of the exercise of the power of eminent domain is not violative of due process. *United States* v. *Southerly Portion of Bodie Is.*, 114 F. Supp. 420, 430 (E.D.N.C. 1953); *United States* v. *Winn*, 83 F. Supp. 172, 174 (W.D.S.C. 1949). Section 30 of New York's Highway Law sets forth the condemnation procedures to be followed by the Commissioner. Condemnation maps are filed in the Office of the County Clerk of the county in which the property is located and in the Department of State. Upon filing with the County Clerk, title vests in the State. Notice is then personally served on the former property owner who may then commence suit in the Court of Claims. If a former property owner remains on the land after the taking, the Commissioner must commence an eviction proceeding on 60 days notice. These procedures clearly meet the requirements of due process. *Bragg* v. *Weaver*, 251 U. S. 57 (1919); *Fifth Av. Coach Lines* v. *City of New York*, 11 N. Y. 2d 342 (1962).

Although plaintiffs' complaints against McMorran make no mention of the appropriations the New York State legislature has provided for the Department of Transportation, there was received in evidence plaintiffs' Ex-

hibit 91 which sets forth the appropriations for the Department of Transportation and its predecessor, the Department of Public Works, for the last few years, including the 1969 appropriation of $371,500,000. No other evidence was introduced on this score and plaintiffs' motion to conform their pleadings to the proof was granted.

We will assume that Exhibit 91 contains the appropriation bill passed by the New York Legislature in 1969, and that the budget procedures set forth by Article VII, §§ 1-4 of New York State's Constitution were carried out. Resulting is a lump sum appropriation for the Department of Transportation in the amount of $371,500,000 for the purposes therein stated.

What puzzles us is why a lump sum appropriation violates the Fifth and Fourteenth Amendment rights of the plaintiffs. As we understand the plaintiffs' claim, it appears to be based on the lump sum appropriation as distinguished from an appropriation with more particularization. But particularization is not always necessary or expedient, especially where road construction is involved. *People* v. *Tremaine*, 281 N. Y. 1, 7 (1939).

In any event, no evidence or authorities have been offered (other than to demonstrate that the appropriation is a lump sum), to show the unconstitutionality of the appropriation and/or the alleged violations of the plaintiffs' Fifth and Fourteenth Amendment rights.

Accordingly the constitutional claims of the plaintiffs are dismissed.

Let this opinion stand for our findings of fact and conclusions of law. Settle order on notice.

THOMAS F. MURPHY,
U.S.D.J.

Dated, New York, N. Y., July 11, 1969.

APPENDIX "C"

Order of District Court, Murphy, J., dated July 25, 1969.

Plaintiffs having commenced these actions seeking declaratory and injunctive relief, and defendants having duly appeared herein, and these actions having been consolidated for trial, and the issues having been duly tried before this Court, without a Jury, and this Court having rendered its opinion and made findings of fact and conclusions of law herein on July 11, 1969,

IT IS ADJUDGED, DECLARED AND DECREED, that the construction of the Hudson River Expressway by the State of New York and the Department of Transportation of the State of New York involves the construction of dikes and causeways over or in a navigable river of the United States, to wit, the Hudson River, within the meaning of Title 33 United States Code §§ 401 and 525 and Title 49 United States Code § 1655, which construction, in so far as the same involves the construction of a dike or dikes requires the consent of the Congress of the United States and the Corps of Engineers of the Department of the Army of the United States, when authorized by the Secretary of the Army of the United States, and, insofar as the same involves the construction of a causeway or causeways, requires the consent of the Congress and the approval of the Secretary of Transportation of the United States; and it is further

ORDERED, ADJUDGED AND DECREED, that the Corps of Engineers, on or about January 27, 1969, exceed its statutory authority in issuing a permit to the State of New York and the Department of Transportation of the State of New York to dredge and fill in the Hudson River for the construction of said Expressway ~~without the prior approval of the Secretary of Transportation of the United States and in the absence of the consent of the Congress of the United States,~~ which permit be, and the same is declared to be un-

T.F.M.

Order of District Court, Murphy, J., dated July 25, 1969.

lawful, null, void and of no force and effect, *ab initio;* and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant William F. Cassidy, individually and as Chief of Engineers, Corps of Engineers of the United States Army, and all persons in active concert with him and his successors and assigns, be and they are hereby permanently restrained and enjoined from issuing a permit to the State of New York and to the Department of Transportation of the State of New York to dredge and fill in the Hudson River for the construction of said Expressway, without the prior approval of the Secretary of Transportation of the United States and in the absence of the consent of Congress of the United States; and it is further

ORDERED, ADJUDGED AND DECREED, that the ~~State of New York, its officers, agents, and employees, and all Departments and Agencies of the State of New York, their respective officers, agents and employees, including specifically but without limitation, the Department of Transportation of the State of New York~~ and defendant J. Burch McMorran, individually and as Commissioner of the Department of Transportation of the State of New York, be and they each are hereby permanently restrained and enjoined from proceeding in any manner with the construction of said Expressway, ~~including, *inter alia,* soliciting or accepting any bids for dredging and filling in the Hudson River for such purpose; soliciting or accepting any bids for the construction of any dike, bridge or causeway, dredging and filling in said river or constructing any dike, bridge or causeway for such purpose, or instituting or prosecuting any proceedings to acquire any land or other property for~~ such purpose, unless and until the consent of the Congress to the construction of such dikes, bridges and causeways shall have been obtained and unless and until the approval of the Depart-

T.F.M.

T.F.M.

Order of District Court, Murphy, J., dated July 25, 1969.

ment of Transportation of the United States has been obtained for the construction of such causeway or causeways and any bridge or bridges; and it is further

~~Ordered, that plaintiffs' claim that Section 340c of the New York Highway Law is an unconstitutional delegation of legislative power be and the same hereby is dismissed; and it is further~~

T.F.M.

Ordered, Adjudged and Decreed that defendant McMorran's motion to dismiss all the claims in the four actions based upon the alleged unconstitutionality of the

T.F.M.

Expressway Law (§ 340-c, Highway Law of the State of New York), be and the same is hereby in all respects granted; and it is further

Ordered, Adjudged and Decreed that the complaints in

T.F.M.

the actions against J. Burch McMorran as primary defendant (69 Civ. 305 and 69 Civ. 448) be and the same hereby are in all respects dimsissed; and it is further

Ordered, that costs shall be taxed against the defend-
in 69 Civ. 295
and 69 Civ. 354 against 69 Civ. 305 and 69 Civ. 448

T.F.M.

and ∧ and in ~~favor~~ ∧ of the plaintiffs in ∧ ~~each of these consolidated actions~~ in accordance with law; and it is further

Ordered, Adjudged and Decreed that any party hereto may apply to this Court for such other and further relief not inconsistent with the facts found and law declared in the aforesaid decision of this Court as may be deemed requisite for the fair enforcement of this order, judgment and decree, upon five days notice to all parties.

Dated: New York, N. Y., July 25, 1969.

Enter,

Thos. F. Murphy.

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

Nos. 614 and 615

THEODORE W. PARKER, individually and as Commissioner of the Department of Transportation of the State of New York, and JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

Petitioners,

—against—

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, SIERRA CLUB and THE VILLAGE OF TARRYTOWN, NEW YORK,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID SIVE
Attorney for Citizens Committee for the Hudson Valley, Sierra Club and The Village of Tarrytown, New York
445 Park Avenue
New York, N. Y. 10022

ALFRED S. FORSYTH
Winer, Neuburger & Sive
Of Counsel

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	3
STATEMENT OF THE CASES	3
SUMMARY OF ARGUMENT	7
POINT I—There is no merit to the applications for Supreme Court review of the District and Circuit Court judgments that the expressway involves dikes and a causeway	7
The Dikes	8
The Causeway	12
POINT II—Each of the plaintiffs had standing to maintain these actions	13
The Standing of the Village	15
The Standing of the Citizens Committee and the Sierra Club	16
CONCLUSION	25

Cases Cited

Abbott Laboratories v. Gardner, 387 U. S. 136 (1967)	11, 22
Barlow v. Collins, 397 U. S. 159 (1970)	16-19
Board of Education of Central School District No. 1 v. Allen, 20 N. Y. 2d 109, 281 N. Y. S. 2d 799 (1967), affirmed, 392 U. S. 236 (1968)	15

PAGE

Data Processing Service Org., Inc. v. Camp, 397 U. S. 150 (1970) 16-20

Environmental Defense Fund v. Hardin (D. C. Cir. May 28, 1970) 24

Environmental Defense Fund v. Finch, (D. C. Cir. May 28, 1970) 23

Flast v. Cohen, 392 U. S. 83 (1968) 16, 17, 19

Frothingham v. Mellon, 262 U. S. 447 (1923) 17

Isaak Walton League v. Hardin, 313 F. Supp. 1312 (Minn. 1970) 24

Jenkins v. McKeithen, 395 U. S. 411 (1969) 17

Nashville I-40 Steering Committee v. Ellington, 387 F. 2d 179 (6th Cir. 1967), cert. denied 390 U.S. 921 (1968) 20, 21

N.L.R.B. v. Globe Automatic Sprinkler Co., 199 F. 2d 64 (3rd Cir. 1952) 11

Neuburger v. Commissioner of Internal Revenue, 311 U. S. 83 (1940) 10, 11

Office of Communication of United Church of Christ v. Federal Communications Commission, 359 F. 2d 994 (D. C. Cir. 1966) 18, 23

Parker v. United States, 309 F. Supp. 593 (Colo. 1969) 24

Pennsylvania Environmental Council v. Bartlett, No. 70-123 Civ. M. D. Pa. April 30, 1970 24

Puente de Reynosa S.A. v. City of McAllen, 357 F. 2d 43 (5th Cir. 1966) 23

PAGE

Road Review League v. Boyd, 270 F. Supp. 650 (S. D. N. Y. 1967) 6, 17, 21

Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2d Cir. 1965), cert. denied, 384 U. S. 941 (1966) 6, 11, 17, 18, 20-22

Sierra Club v. Hickel, No. 24966, 9 Cir. Sept. 16, 1970 ..... 24, 25

State of Washington Dept. of Game v. Federal Power Commission, 207 F. 2d 391 (9th Cir. 1953) 6

Verbeem v. United States, 154 F. Supp. 431 (Mich. 1957), affirmed sub nom. Amlin v. Verbeem, 356 U. S. 676 (1958) 11

Wilderness Society v. Hickel, D. D. C. April 23, 1970 24

Wisconsin v. Illinois, 278 U. S. 367 (1929) 8

Statutes Cited

5 U.S.C.:

Sec. 701, et seq. (Administrative Procedure Act) 5, 22

Sec. 702 18

16 U.S.C.:

Sec. 793 et seq. (Federal Power Act) 21

28 U.S.C.:

Sec. 1331(a) (Federal Question Statute) 5

PAGE

33 U.S.C.:

Sec. 401 (Rivers and Harbors Act of 1899) 3, 4, 7, 8, 10

Sec. 403 (Rivers and Harbors Act of 1899) 4, 5, 8

Sec. 525 (General Bridge Act) 4

49 U.S.C.:

Sec. 1651 (Department of Transportation Act) 4

Sec. 1655 (Department of Transportation Act) 4

Ch. 292, Laws of New York 1965, as amended by Ch. 428, Laws of New York 1966 5

Hudson River Compact Act, Public Law 89-605 ..... 4, 5

National Environmental Policy Act of 1969 (Public Law 91-190):

Sec. 101(a) 12

Rule Cited

Federal Rules of Civil Procedure:

60(b) 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

Nos. 614 and 615

THEODORE W. PARKER, individually and as Commissioner of the Department of Transportation of the State of New York, and JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

Petitioners,

—against—

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, SIERRA CLUB and THE VILLAGE OF TARRYTOWN, NEW YORK,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Citizens Committee for the Hudson Valley, Sierra Club and the Village of Tarrytown, New

York, plaintiffs in the actions below, oppose the petitions of Theodore W. Parker and of John Volpe and other federal officials*, defendants in the actions below, for certiorari to the United States Court of Appeals.

---

* In this brief respondents are referred to as plaintiffs and petitioners as defendants. The following additional short titles and abbreviations are used.

U. S. District Court for the Southern District of New York—the "District Court";

U. S. Court of Appeals for the Second Circuit—the "Circuit Court";

Decision of District Court, per Hon. Thomas J. Murphy, U.S. D.J., dated July 11, 1969—the "District Court Opinion";

Order, decree and judgment of the District Court dated July 25, 1969—the "Judgment";

Decision of Circuit Court dated April 16, 1970—the "Circuit Court Opinion";

Permit dated January 27, 1969, a copy of which is Pl. Ex. 7—the "Expressway Permit";

Citizens Committee for the Hudson Valley—the "Citizens Committee";

Village of Tarrytown, New York—the "Village";

Theodore W. Parker—"Parker";

John Volpe, Walter F. Hickel, Stanley S. Resor and William F. Cassidy—"Volpe", "Hickel", "Resor" and "Cassidy", respectively, all of whom are sometimes collectively referred to as the "federal defendants";

Department of Transportation of the State of New York—the "State DOT";

Department of Transportation of the United States—the "Federal DOT";

Corps of Engineers of the U. S. Army—the "Engineers";

The proposed Hudson River Expressway—the "Expressway";

Appendix to the federal defendants' petition—"A.".

Questions Presented

Parker's petition for certiorari presents two questions to this Court:

1. Does the Expressway involve dikes and a causeway within the meaning of those terms as used in 33 U. S. C. §401?

2. Does each of the plaintiffs have sufficient standing to bring these actions?

The federal defendants' petition presents only the first question stated above. The Solicitor General does not raise the standing issue.

Statement of the Cases

The Expressway is a six lane truck and passenger car road project planned to be built by the State DOT, of which Parker is now Commissioner. It would run from Tarrytown to a point approximately thirty-five miles north. The portion of the Expressway involved in these cases would be approximately ten miles in length and go along the eastern shore of and in the Hudson River, from Tarrytown to Crotonville. Over four miles of this proposed portion would rest on 9,500,000 cubic yards of fill which would extend at its widest point 1300 feet into the river. The fill would raise the land presently at river bottom to an elevation above the shore line. In these four consolidated actions, plaintiffs sought a judgment declaring the Expressway unlawful, and enjoining the defendants from proceeding with its construction.

The Village lies at the southern end of the Expressway, and would be crossed by part of it and bounded on the river side by another part of it. Part of the Village area that would be crossed by the Expressway is the

area of an urban renewal project which receives federal funding.

The Citizens Committee and the Sierra Club are two citizen conservation groups, the former local and in the area of the Expressway, and the latter national, with a local Atlantic Chapter and a large number of members in the area of the Expressway.

The actions involve three separate series of claims by plaintiffs:

1. Claims (hereinafter the "Sec. 401 claims") that construction of the Expressway would be in violation of 33 U. S. C. §§401, 403 and 525, and 49 U. S. C. §§1651 and 1655, in that:

> A. the Application by the State DOT for the Permit should have been treated by Resor and Cassidy as one involving the construction of "causeways, dams, or dikes" "over or in" a "navigable river" thus requiring the consent of Congress under 33 U. S. C. §401 and the approval of the Secretary of Transportation under 49 U. S. C. §1655 (g);
>
> B. it was unlawful for Resor and Cassidy to treat the Application as governed solely by 33 U. S. C. §403, not requiring the consent of Congress.

2. Claims (hereinafter the "Arbitrary action claims") that the grant by Cassidy and Resor of the Expressway Permit, purportedly under 33 U. S. C. §403, and the approval of the Expressway by Hickel's predecessor in office, Stewart Udall, purportedly under Public Law 89-605, were arbitrary, capricious and otherwise unlawful; and

3. Claims (hereinafter the "Constitutional claims") that the statute authorizing construction of the Expressway (Ch. 292, Laws of New York 1965, as amended by Ch. 128, Laws of New York 1966) is unconstitutional under the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.

In its Opinion the District Court held:

> ". . . based on the evidence presented at trial, that 'dikes', characterized as such by the defendants, are to be constructed along the western side of the fill and that Congress when it said 'any dike' over or in any navigable river meant exactly that." (A. 14)

Judge Murphy also found and concluded that the Expressway provided for "a causeway supporting the road where it leaves the natural shoreline south of the Tappan Zee Bridge until the road reaches the southernmost point of the fill." (A. 102a). He sustained plaintiffs' Sec. 401 claims and held that it was unnecessary to rule upon their Arbitrary action claims. He denied plaintiffs' constitutional claims.

Prior to and at the trial defendants challenged the jurisdiction of the court and the standing of the plaintiffs. Jurisdiction of the suits was found by the District Court under the Administrative Procedure Act, 5 U. S. C. §701 *et seq.* With respect to the claims by the Village, jurisdiction was also found under the Federal Question Statute, 28 U. S. C. §1331(a).

As to standing, that of the Village was upheld on the basis of the Expressway's interference with its urban renewal project and the proof of the Village's loss of tax revenue. (A. 20-21). Judge Murphy also sustained the

standing of the Citizens Committee and the Sierra Club, relying on *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965), cert. denied 384 U. S. 941 (1966), and *Road Review League* v. *Boyd*, 270 F. Supp. 650 (S. D. N. Y. 1967).

The Circuit Court Opinion affirmed the District Court Opinion and Judgment in all respects, upholding the District Court's jurisdiction, the standing of each of the plaintiffs, and the holdings as "to the merits of the controversy." (A.33). It also upheld the dismissal of plaintiffs' Constitutional claims.

The standing of each of the plaintiffs was sustained by the Circuit Court on substantially the same grounds as the District Court. With respect to the standing of the Citizens Committee and the Sierra Club, the Circuit Court stated:

> "We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." [Citing *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, *supra*; *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391 (9th Cir. 1953); and *Road Review League* v. *Boyd*, *supra*.] (A. 46-47)

Both Parker and the federal defendants now seek certiorari. Neither raises the jurisdictional issue. Both argue the merits. Parker alone questions the plaintiffs' standing. Plaintiffs oppose both petitions for certiorari.

Summary of Argument

1. The holdings of the District and Circuit Courts that the Expressway involves the construction of dikes and a causeway, as those terms are defined in 33 U.S.C. §401, and therefore requires the consent of Congress and the approval of the Secretary of Transportation, should not be reviewed by this Court.

2. Each of the plaintiffs has sufficient standing to bring these actions. The District and Circuit Courts found that the public interest in environmental resources—an interest which has been recognized both legislatively and judicially—is a legally protected interest, and that plaintiffs, as responsible representatives of the public, have standing to obtain judicial review of agency action which both the District and Circuit Courts have found to have been unlawful. The Village's standing also rests upon the District and Circuit Court findings that it would suffer a loss of tax revenue and interference with its urban renewal project. The position of Parker lacks merit and does not warrant a review of this issue by this Court.

POINT I

There is no merit to the applications for Supreme Court review of the District and Circuit Court judgments that the expressway involves dikes and a causeway.

The Circuit Court Opinion deals only "briefly with the merits of the controversy", and sustains the District Court's findings and holdings that the Expressway involves dikes and a causeway, pointing out the

> "29 days of trial, during which numerous exhibits were offered (including a model of the proposed Expressway), experts were examined, maps, charts and technical dictionaries were consulted and the facts were exhaustively presented." (A. 48)

The Dikes

The holdings of the District Court and Circuit Court as to the presence of dikes are attacked by defendants as:

1. in conflict with "prior decisions of this Court" (Parker petition, p. 7);

2. constituting "a strained and illogical interpretation to §§9 and 10 of the Rivers and Harbors Act of 1889" (Parker petition, p. 7); and

3. in violation of "a long-standing administrative interpretation of the statutes in question" (Parker petition, p. 7).

Let us consider first the "prior decisions of this Court". Only one Rivers and Harbors Act case is cited, *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929). That case involved withdrawal of water from Lake Michigan, not dikes or causeways.

At issue was the construction of §10 of the Act, not §9. This Court discussed the relevant legislative history of §§9 and 10, pointing out that the Act of 1899 modified an earlier act and stating:

> "A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890." *Id.* at 412.

After the portion of the opinion quoted above appears the portion quoted in Parker's petition, at pp. 7-9, the first two sentences of which are set forth below:

> "* * * Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized *in the classes of cases described in the second and third clauses of Section 10.* If the Section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of *the undertakings specifically provided for in the second and third clauses of Section 10* could safely be undertaken without a special authorization of Congress." (Emphasis supplied.)

The structures involved in the Expressway are neither "in the classes of cases described" nor "the undertakings specifically provided for", in "the second and third clauses of Section 10." They are "in the classes of cases described" and "undertakings specifically provided for in" Section 9 of the Act. They, accordingly, require the consent of Congress.

The claim that the courts below gave "a strained and illogical interpretation" to the statute is itself strained and illogical and is based on misstatements of the District and Circuit Court Opinions and of the evidence. The most glaring misstatement appears at page 9 of Parker's petition:

> "The District Court's determination that 'dikes' are involved in the construction of the Expressway is based upon the following reasoning which was adhered to by the Court of Appeals: Since the per-

> mit application submitted to the Corps of Engineers mentions the word 'dike', there is therefore a dike and consequently, the Corps of Engineers has no authority to issue the permit."

The evidence reviewed by the Circuit Court, as that before the District Court, was all of that received during the "29 days of trial." It included, of course, the permit application as well as numerous other references by the State DOT, its engineering consultants, and the Engineers to the dikes.

Defendants raise before this Court the same claims as those rejected by the District and Circuit Courts concerning a purported "long-standing administrative practice" (Parker petition, p. 7) with regard to what constitutes a dike. Passing for the moment the question of whether any administrative practice of acting unlawfully can become lawful by the passage of time or the frequent repetition of the unlawful acts, the question arises of what proof lies in the record of such administrative practice. The answer is that no such proof exists.

Reference is made in Parker's petition (p. 10) to situations in which the word "dikes" appeared and the Engineers granted the applications. Why such cases were not brought to the attention of the District Court during the trial is not stated. Presumably the vast resources of the several defendant governmental departments and their legal staffs were available prior to and during as well as after trial. No application has ever been made to reopen the record on the ground of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." Rule 60(b) Federal Rules of Civil Procedure. Defendants and their attorneys

obviously chose not to offer such evidence. They did not then deem it relevant, because none of the works concerned were at all similar to the expressway.

Plaintiffs submit that there has been no administrative practice such as that alleged by defendants. If, however, the completely unjustified concession is made that an administrative practice of the Engineers has heretofore permitted the construction of dikes, in violation of the express terms of 33 U.S.C. §401, authority, reason, and justice decree that such practice should end.

The authorities are clear that administrative practice can be of some aid in the construction of a statute, "but beyond question [it] cannot narrow the scope of a statute when Congress has plainly intended otherwise." *Neuburger* v. *Commissioner of Internal Revenue*, 311 U. S. 83, 89 (1940). In accord:

> *N.L.R.B.* v. *Globe Automatic Sprinkler Co. of Pa.*, 199 F. 2d 64 (3rd Cir. 1952);
> *Verbeem* v. *United States*, 154 F. Supp. 431 (Mich. 1957), *affirmed sub nom. Amlin* v. *Verbeem*, 356 U. S. 676 (1958).

If the Engineers have had a long-standing administrative practice of licensing dikes without considering 33 U.S.C. §401, such practice may well have become long-standing only because it was immune from review prior to the decision by this Court in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967) and that of the Circuit Court in *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied* 384 U. S. 941 (1966). Those decisions and others discussed under Point II of this brief now subject the Engineers to the test of Congress' substantive laws.

Those laws may and should be used to further

> "[the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." National Environmental Policy Act of 1969, Sec. 101(a) (Public Law 91-190).]

See also: *Zabel* v. *Jabb*, 5th Cir. July 16, 1970 reversing 276 F. Supp. 764 (S. D. Fla. 1969).

No reason exists for this Court's reviewing the District and Circuit Court judgments that the Expressway involves dikes.

The Causeway

The District Court held that:

> ". . . the proof at trial clearly shows a causeway supporting the road where it leaves the natural shore line south of the Tappan Zee Bridge until the road reaches the southernmost point of the fill." (A. 15)

Defendants repeat their twice-rejected claim that the causeway is a "mere possibility" (Parker petition, p. 14) to which the District and Circuit Courts should have blindfolded themselves. Tens of millions of dollars should be spent, millions of cubic yards dumped into the River, and vast physical and sociological changes effected, and *then and only then*, they say, should Congress and the Federal DOT consider whether to permit the causeway. The claim is unworthy of serious consideration by this Court.

POINT II

Each of the plaintiffs had standing to maintain these actions.

Parker, but not the federal defendants, seeks review by this Court of the question of the standing in court of each of the plaintiffs. The judgments of the District and Circuit Courts are said to represent "an unwarranted application of recent decisions of this Court." (Parker petition, p. 15)

This Court, as the Circuit Court below stated in its opinion:

> "has observed that the law of standing is a 'complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations * * *.' *United States ex rel. Chapman* v. *F.P.C.*, 345 U. S. 153, 156, 73 S. Ct. 609, 612, 97 L. Ed. 918 (1953). Judge (now Chief Justice) Burger, in his *Office of Communication of United Church of Christ* v. *F.C.C., supra,* opinion characterized the concept of standing as 'a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding * * *.' *Id.* 359 F. 2d at 1002." (A. 41-42)

The "practical and functional" effect of denial of standing to the plaintiffs in this action should be considered even before any analysis of the "recent decisions of this Court", said by Parker to have been wrongfully applied by the District and Circuit Courts.

The answer is nothing short of permitting a major and irrevocable alteration, which two courts have adjudicated

to be unlawful, of a resource which Congress has declared to be of "immense economic, natural, scenic, historic and recreational value to all the citizens of the United States." (Public Law 89-605). Parker's position is that even though such illegality has been adjudicated, and the District Court had jurisdiction of the subject matter of the actions (which both the federal defendants and Parker now concede), none of the plaintiffs herein is a person entitled to invoke that jurisdiction. The incorporated Village, in which thousands of the persons affected by the gargantuan and unlawful Expressway live and work, Parker says, may not be heard; nor may either of the two citizen organizations, whose purposes and objects are the protection of natural resources and of the human resources and values dependent upon those natural resources. Each plaintiff, it is claimed, must stand outside the doorways of the Court and wait for someone else to sue, to protect some more vested pecuniary and traditional interest of the nature of those to which courts may have limited themselves at times when there was no such thing as either an Expressway or a national environmental policy which directs that the short term and long term environmental effects of an Expressway be thoroughly considered before any federal agency authorizes the digging, filling and dike building. Unless such a person does come into court, says Parker, the unlawful dumping of 9,500,000 cubic yards of fill into the River may proceed, the unlawful dikes and causeways may be built, and the $125,000,000 or more necessary may be spent to build the unlawful project.

The position of Parker would be an anomalous one at any time. In a period of great national debate over whether personal conscience may be superior to law in various situations where the two are claimed to be in conflict, it is important that the position of Parker be understood for what it is: a claim that he is above and beyond the law.

The Standing of the Village

Before analysis of the "recent decisions of this Court" which Parker claims the courts below have misapplied, decisions which have expanded traditional concepts of standing and the nature of the interests which sustain standing, it is also important to point out that the standing of one of the plaintiffs, the Village, does not rest upon any such decisions, but upon the most narrow and traditional concepts. The Village's standing has been sustained because, as stated by the Circuit Court:

> "The district court found that the Village of Tarrytown would suffer 'loss of tax revenues and interference with the Urban Renewal project already in progress in the Village.' 302 F. Supp. at 1092. See Scenic Hudson Preservation Conf. v. F.P.C., 354 F. 2d at 616." (A. 47)

Those losses and interference, the District Court held, would exceed $10,000. Parker's comment concerning this holding is not any analysis of "recent decisions of this Court" but the bald allegation that the District Court erred in this finding of fact. Reference, but no citation, is made to alleged "uncontroverted proof" (p. 17) about the long term effect of the Expressway. This is a misstatement. The evidence was controverted. The District Court found the controverting evidence to be of greater weight and quality than Parker's evidence.

A second point is made by Parker with respect to the standing of the Village. It is claimed that the Village had "no legal standing to assail the validity of the state action." (p. 17) Neither of the cases cited supports the proposition. They do not deal with the right of a municipality to challenge unlawful activities by the State. See *Board of Education of Central School District No. 1 v. Allen*, 20 N. Y. 2d 109, 281 N. Y. S. 2d 799 (1967), affirmed 392 U. S. 236 (1968).

The argument should also be summarily disposed of because of Parker's own acts in these consolidated actions. He moved to dismiss the two of the four consolidated actions brought against him on the ground of sovereign immunity. That motion was granted, except with respect to the Constitutional claims. 297 F. Supp. 809 (S. D. N. Y. 1969). Before the determination of that motion, however, and on the hearing of plaintiffs' preliminary injunction motion, Parker intervened in the actions brought against the federal defendants. He actively defended on the merits in all further proceedings, to and through trial, judgment and appeal to the Circuit Court. He may not now claim any sovereign immunity in the federal court, masked as a standing argument.

The Standing of the Citizens Committee and the Sierra Club

The standing question, with respect to the Citizens Committee and the Sierra Club, does call for some consideration of "recent decisions of this Court", three of which are cited by Parker:

> *Flast* v. *Cohen,* 392 U. S. 83 (1968);
> *Data Processing Service Org., Inc.* v. *Camp,* 397 U. S. 150 (1970); and
> *Barlow* v. *Collins,* 397 U. S. 159 (1970).

Parker's argument concerning "these recent cases" begins with the setting up of a straw man. Those decisions, it is said:

> "have apparently created the impression that standing is no longer an issue in any matter involving review of the actions of State and Federal officials." (pp. 15-16)

Neither the District nor the Circuit Court had any such "impression." The bases of the District and Circuit Court Opinions are clearly set forth therein. Parker's disregard of the facts and the record in the Courts below in this connection is characteristic of his entire petition. The Circuit Court Opinion does not refer at all to any of the three recent decisions cited by Parker. The most significant recent Supreme Court case to which the Circuit Court Opinion does refer, one not cited by Parker in his petition, is *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969). The cases upon which both the District Court and the Circuit Court relied more directly are not Supreme Court cases, but the Second Circuit case of *Scenic Hudson Preservation Conference* v. *Federal Power Commission, supra,* and the District Court case of *Road Review League* v. *Boyd, supra.*

Let it be assumed, however, that Parker's argument is that the Circuit and District Courts *should have referred to Flast, Data Processing* and *Barlow*. *Flast* though not a direct precedent to support plaintiffs' standing in this action, did open the door that had been closed to taxpayers' suits since *Frothingham* v. *Mellon*, 262 U. S. 447 (1923). The Supreme Court viewed Mrs. Frothingham as lacking standing because she did not allege that Congress had breached a specific constitutional limitation of its taxing power, whereas Flasts's complaint was that a congressional act violated the constitutional provisions relating to the separation of church and state. The Court held that an ordinary citizen's right to insist that the government not violate the establishment of religion clauses of the First Amendment was a sufficient personal stake in the outcome to give the plaintiff standing. *Flast* v. *Cohen* is indicative of a trend toward liberality in determining who may invoke the judicial process.

In *Data Processing*, this Court reversed the Court of Appeals for the Eighth Circuit (406 F. 2d 837), which had affirmed the District Court for the District of Minnesota in its dismissal for lack of standing of a suit brought by sellers of data processing services. They had sought to challenge a ruling by the Comptroller of the Currency.

This Court, per Mr. Justice Douglas, held that the standing question is that of "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 80 Stat. 392, 5 U.S.C. § 702. That interest at times, may reflect 'aesthetic conservational, and recreational' as well as economic values. *Scenic Hudson Preservation Conference* v. *Federal Power Commission, supra; Office of Communication of United Church of Christ*, 123 U. S. App. App. D. C. 328, 359 F. 2d 994, 1000-1006." *Data Processing Service* v. *Camp, supra*, at 153.

In *Barlow* this Court likewise reversed Court of Appeals and District Court judgments denying standing. Mr. Justice Douglas again rendered the majority opinion, stating:

> "Our decision in Association of Data Processing Service Organizations v. Camp, 396 U. S. ——, 90 S. Ct. 827, 24 L. Ed. 2d ——, leads us to reverse here.
>
> "First, there is no doubt that in the context of this litigation the tenant farmers petitioners here,

have the personal stake and interest that impart the concrete adverseness required by Article III.

"Second, the tenant farmers are clearly within the zone of interests protected by the Act." *Barlow* v. *Collins, supra* at 161.

Parker's petition sets forth no real analysis of *Flast*, *Data Processing* and *Barlow*. He does state that neither they "nor any other decisions of this Court have ever gone so far as to allow any individual or organization whatsoever to bring suit to protest any governmental action or proposed action". (p. 16) Neither of the Courts below, of course, ever said that; nor have plaintiffs taken that position.

The Circuit Court did hold that there is a public interest, evidenced by "administrative as well as congressional concern for natural resources in the present exercise of federal authority . . ." in the environmental resources involved in the Expressway, and that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." (A. 46-47).

The Circuit Court holding is fully consistent with the two-fold test enunciated by this Court in *Data Processing*. Injury in fact, albeit non-pecuniary in nature, was alleged and was abundantly proved by plaintiffs. The impairment of scenic and natural resource values and the adverse effect upon the environment of the noise, filth and visual offense to the residents of the area, are eloquent and adequate proof of the injury which the challenged project

would work upon the members of the Citizens Committee and the Sierra Club. Their interests are within the zones of interest which are sought to be protected by the statutes which the Circuit Court found relevant.

The fact that the interests of the Citizens Committee and the Sierra Club are non-pecuniary, or in some sense "public" interests, does not adversely affect their standing. In *Scenic Hudson Preservation Conference* v. *Federal Power Commission, supra,* cited with approval by this Court in *Data Processing,* the Circuit Court held that the concept of a party "aggrieved" under a federal statute encompassed organizations such as the *ad hoc* association which was the main opposing intervenor in the Federal Power Commission proceedings involving the proposed pumped storage power project at Storm King Mountain. In rejecting a pecuniary test of standing, urged in that case, as in these cases, the Circuit Court there noted that:

> "Even in cases involving organizational standing to sue, the Supreme Court has not made economic injury a prerequisite where the plaintiffs have shown a direct personal interest." *Id.* at 615.

In the course of its opinion the Circuit Court further stated:

> "In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under §313(b)." *Id.* at 616.

A similar non-pecuniary interest was recognized as adequate to establish standing in *Nashville I-40 Steering Committee* v. *Ellington*, 387 F. 2d 179 (6th Cir. 1967) citing *Scenic Hudson*. Certiorari was also denied in that case by the Supreme Court (390 U. S. 921).

Both the Circuit Court and the District Court also relied on *Road Review League* v. *Boyd, supra,* in which the District Court held that there is no reason why the word "aggrieved" should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act. The Circuit Court phrased its agreement with *Road Review League* as follows:

> "We agree with the conclusion of Judge McLean in Road Review League v. Boyd, 270 F. Supp. 650, 661 (S. D. N. Y. 1967) that the meaning of 'aggrieved' in one act is not different from its meaning in the other. Section 702 of the Administrative Procedure Act provides that a person 'aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.' These plaintiffs, alleging that the Corps and the Secretary of the Army ignored their environmental concerns are 'aggrieved' within the meaning of at least three 'relevant statute[s].'" (Footnotes omitted.) (A. 45)

Parker attempts to distinguish *Scenic Hudson* by a claim that there is no statute "creating a legally protectable interest on behalf of any of the plaintiffs" (p. 17), and that the Citizens Committee and the Sierra Club are not groups "who by their activities and conduct have exhibited a special interest" in "aestetic, conservational, and recreational values".

The first claimed basis of distinction overlooks the point made by *Road Review League,* and by the District Court

and the Circuit Court in these cases, that the Administrative Procedure Act (5 U.S.C. §702) has the same "aggrieved" term as the Federal Power Act. Both the District and Circuit Courts have held, and Parker and the federal defendants now concede, that jurisdiction in these cases lies under the Administrative Procedure Act and that, under *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967), the Engineers' grant of the Permit is reviewable. The only question, therefore, is that of whether the Citizens Committee and the Sierra Club "by their activities and conduct have exhibited a special interest" in "aesthetic conservational and recreational values."

Addressing himself to this question, Parker alleges that:

> ". . . the proof showed that this organization never engaged in any type of conservation activities in the area." (p. 18)

This statement is wholly contrary to the uncontroverted evidence of the Sierra Club activities,* as testified to by two witnesses called by Parker, Club President Philip Berry and David Sive, plaintiffs' trial attorney in those actions. The record also shows that on this very Expressway project representatives of the Sierra Club appeared at no less than four public hearings on the Expressway and gave testimony in opposition to it. Details of other significant conservation activities in the area of the Hudson River and Valley, of the Sierra Club and its Atlantic Chapter, including active intervention before the Federal Power Commission in opposition to the Storm King mountain power project which is involved in *Scenic Hudson*, were furnished by Mr. Sive, testifying as Parker's witness.

---

* The scope of the Sierra Club's activities is documented in the Federal Power Commission decision dated August 19, 1970, in the Storm King Proceeding, Consolidated Edison Company of New York, Inc., Project No. 2338.

Parker also claims that:

> ". . . No evidence was produced at trial that the Ad Hoc Citizens Committee were engaged in any aesthetic, conservation or recreational activities other than opposing the expressway." (Parker petition, p. 18)

This is contrary to the testimony of William Hoppen, Esq., Chairman of the executive committee of the Citizens Committee, likewise called by Parker's lawyer and examined at great length in an effort, unbecoming the State of New York, to discredit him and the Committee. Mr. Hoppen testified concerning the Committee's activities in connection with New York State's Forest Preserve, its cooperation with Scenic Hudson Preservation Conference in opposing the Storm King project, its opposition to the construction of an apartment house on the Palisades, and other activities. The statement is, in any event, irrelevant. Scenic Hudson Preservation Conference was an *ad hoc* organization created to oppose the Storm King Project, as was the Nashville I-40 Steering Committee, created to halt the construction of Interstate 40 through Nashville.

To the recent standing cases above cited may be added a host of other cases under which federal courts have expanded the traditional concepts of standing and modified them to permit the assertion by private parties of public or quasi-public rights.

See, e.g.:

Office of Communication of United Church of Christ v. *Federal Communications Commission*, *supra;*

Environmental Defense Fund v. *Hardin*, D. C. Cir. May 28, 1970;

Environmental Defense Fund v. *Finch*, D. C. Cir. May 28, 1970;
Puente de Reynosa S.A. v. *City of McAllen*, 357 F. 2d 43 (5th Cir. 1966);
Parker v. *United States*, 309 F. Supp. 593 (Colo. 1969);
Pennsylvania Environmental Council v. *Bartlett*, No. 70-123 Civ., M. D. Pa. April 30, 1970.
Isaak Walton League v. *Hardin*, 313 F. Supp. 1312 (Minn. 1970);
Wilderness Society v. *Hickel*, D. D. C. April 23, 1970;

Respondents are aware of the September 16, 1970 decision of the United States Court of Appeals for the 9th Circuit in *Sierra Club* v. *Hickel*, #24966. In that case it was held that the Sierra Club was without the standing necessary to sue for "a declaratory judgment and preliminary and permanent injunctions enjoining issuance of the permits required for implementation of a plan proposed by Walt Disney Productions, Inc., for a large scale commercial-recreational development in and near Mineral King Valley . . . in California."

Sierra Club v. *Hickel* has no bearing at all on the standing of the Village or the Citizens Committee. The Ninth Circuit opinion itself distinguishes the Circuit Court Opinion in these cases, as well as *Parker* v. *United States*, *supra*, on the ground that:

> "In both of [those] cases . . . the Sierra Club was joined by local conservationist organizations made up of local residents." *Sierra Club* v. *Hickel*, *supra* at 16-17.

Sierra Club v. *Hickel* does set forth a disagreement with the Circuit Court in these cases "[to] the extent that the Sierra Club has standing within the 'private attorney general' role." This disagreement is not material, however, to the Ninth Circuit's principal holding and constitutes no reason for review by this court.

No reason exists for this Court to review the District Court and Circuit Court holdings on standing.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari to the United States Court of Appeals for the 2nd Circuit should be denied.

Respectfully submitted,

DAVID SIVE
Attorney for Citizens Committee for the Hudson Valley, Sierra Club and The Village of Tarrytown, New York
445 Park Avenue
New York, N. Y. 10022

ALFRED S. FORSYTH
Winer, Neuburger & Sive
Of Counsel

LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM 1970

Supreme Court, U.S.
FILED
OCT 21 1970
E. ROBERT SEAVER, CLERK

No. 614

THEODORE W. PARKER, individually and as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

and JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

against

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, SIERRA CLUB and the VILLAGE OF TARRYTOWN, NEW YORK,

Respondents.

REPLY BRIEF IN SUPPORT OF CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOEL H. SACHS
Assistant Attorney General
of Counsel

Rose of Fragment Press, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

	PAGE
Argument	1
Conclusion	9

CASES CITED

Abbott Laboratories v. Gardner, 387 U. S. 136, 141 (1967)	4
Barlow v. Collins, 397 U. S. 159 (1970)	4
Citizens Committee for the Columbia River Sierra Club and Washington State Sportsman Counsel, Inc., et al. v. Stanley S. Resor, et al. (No. 69—498)	6
Citizens Committee for the Hudson Valley v. Volpe, 425 F. 2d 97 (2d Cir. 1970)	7
County of Albany v. Hooker, 204 N. Y. 1, 9 (1920)	5
Data Processing Service v. Camp, 397 U. S. 150 (1970)	4
Ferry v. Udall, 336 F. 2d 706 (9th Cir. 1964), cert. denied 381 U. S. 904 (1965)	4
Flast v. Cohen, 392 U. S. 83 (1968)	4
Hunter v. Pittsburgh, 207 U. S. 161, 178 (1907)	5
Reynolds v. Syms, 377 U. S. 535, 575 (1964)	5
Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967)	2
Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608, 603 (2d Cir. 1968)	2, 4
Sierra Club v. Hickel, No. 24966	2

PAGE

State of Delaware et al. v. Pennsylvania New York Central Transportation Company, et al. (No. 3849—D. Del.) 6

Troutman v. Shriver, 417 F. 2d 171 (1969) 4

United States v. Walker, 409 F. 2d 477 (9th Cir. 1969) 4

Williams v. Eggleston, 170 U. S. 304, 310 (1898) 5

STATUTES

5 U.S.C. § 701(a)(2) 4

N. Y. Const. Art. IX, Sec. 2 5

Rivers and Harbors Act of 1899 §§ 9 and 10 6

Supreme Court of the United States

OCTOBER TERM 1970

No. 614

THEODORE W. PARKER, individually and as Commissioner of the Department of Transportation of the State of New York,

Petitioner,

and JOHN VOLPE, individually and as Secretary of Transportation of the United States, WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, STANLEY S. RESOR, individually and as Secretary of the Army of the United States, and WILLIAM F. CASSIDY, individually and as Chief of Engineers, Corps of Engineers of the U. S. Army,

against

CITIZENS COMMITTEE FOR THE HUDSON VALLEY, SIERRA CLUB and the VILLAGE OF TARRYTOWN, NEW YORK,

Respondents.

REPLY BRIEF IN SUPPORT OF CERTIORARI

ARGUMENT

Neither the respondents nor the courts below found any language in the relevant statutes or congressional history to support the conclusion that persons such as respondents are aggrieved persons under the Administrative Procedure—

Act. The courts below simply followed *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1968) and *Road Review League* v. *Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967). Actually none of the respondents are aggrieved persons any more than any other person residing in the surrounding area.

This is recognized in the Hart-McGovern bill (S. 3575) which, if enacted, would permit any citizen to maintain an action to protect the environment. See New York Times, October 18, 1970, section 4, p. 6 , discussing this and reporting that the bill was meeting with substantial opposition. The necessity for such legislation undercuts respondents' reference (Br. p. 12) to the National Environmental Policy Act.

The citations by respondents (Br. pp. 23-24) of cases either in the Circuit Court of the District of Columbia or in the District Courts of recent unpublished opinions which are stated to "have expanded the traditional concepts of standing and modified them to permit the assertion by private parties of public or quasi-public rights" is an admission that the expansion is one which should be reviewed by this Court.

This is rendered especially so by the recent opinion in the Ninth Circuit in *Sierra Club* v. *Hickel*, No. 24966, handed down on September 16, 1970, which is in direct conflict with the position of the respondents. There is thus clearly a direct conflct between at least the two circuits.

In that case, the Ninth Circuit held that the Sierra Club, the very same organization which sued in the instant case, did not have standing to challenge the actions of federal officials concerning the development of a commercial and recreational area in and near Mineral King Valley located within Sequoia National Forest in California. The Court there indicated that "such club concern without a showing of more direct interest" cannot constitute standing in the

sense that that concept has been set forth by this Court and the lower courts in recent decisions.

The only alleged basis for standing in that case, which is the exact same basis upon which the Second Circuit upheld standing for the Sierra Club in this case was the fact that the actions of the federal officials "are personally displeasing or distasteful to them." As in the case at bar, the Ninth Circuit found none of the Sierra Club's property will be damaged, neither its organization or its members endangered nor its status threatened.

The Ninth Circuit then held that it diametrically opposed the decision which had been arrived at by the Second Circuit in the instant case:

> "To the extent to which *Citizens Committee for Hudson Valley* v. *Volpe, supra,* indicates that the Sierra Club has standing within the 'private Attorney Generals' rule, we respectfully disagree. We believe that rule is limited as it states to cases where Congress has enacted a statute 'conferring on any non-official person, or on a group of non-official persons, authority to bring a suit' to prevent unauthorized official action. See, *Scanwell Laboratories, Inc.* v. *Shaffer, supra,* 424 F. 2d at 864. We find no indication in any federal statute that Congress has 'conferred' on the Sierra Club or any group like it, authority to bring suits to challenge official action." (p. 12, fn. 9)

In both the Ninth Circuit case and in the Second Circuit case, the Sierra Club made virtually identical allegations as to the alleged aesthetic and conservational injury which would allegedly be imposed upon its members should the proposed project be constructed.

Whether the Sierra Club has standing is intimately entwined with whether the other respondents herein, the local *ad hoc* Committee and the Village of Tarrytown have sufficient standing, since the essence of all their allegations

was that there was an aesthetic and conservational interest which would be endangered by the construction of the Hudson River Expressway.

The essence of petitioner Parker's position is simply that respondents have failed to show that the challenged action has caused injury to them, aesthetic, economic or otherwise and have further failed to demonstrate that the interest sought to be protected by them is within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970).

Unlike *Flast* v. *Cohen*, 392 U. S. 83 (1968), *Data Processing Service* v. *Camp*, *supra*; *Barlow* v. *Collins*, 397 U. S. 159 (1970) and *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 603 (2d Circuit 1968), there is no federal statute or constitutional guarantee conferring on any of the respondents herein the right to bring the instant action.* Furthermore, respondents' brief lends further credence to petitioner Parker's contention that none of the respondents herein have shown sufficient interest, aesthetic, economic or otherwise in the area where the Expressway is to be built in order to uphold standing.

The only indications of the "interest" of the Sierra Club in this area is that representatives of the club appeared at several public hearings in opposition to the Ex-

---

* Contrary to the impression held by respondents (Br. pp. 12, 22), we think the Circuit Court misapplied the language in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967), as establishing the jurisdiction to review under the Administrative Procedure Act. We believe the language in the opinion of this Court is to be read as applying only to situations where the aggrieved person is required to act affirmatively which is not the case here. That was the view expressed by the Fifth Circuit in *Troutman* v. *Shriver*, 417 F. 2d 171 (1969). Moreover, the issue here is "agency action . . . committed to agency discretion by law" (5 U.S.C. § 701(a)(2)); *Ferry* v. *Udall*, 336 F. 2d 706 (9th Cir. 1964), cert. denied 381 U. S. 904 (1965); *United States* v. *Walker*, 409 F. 2d 477 (9th Cir. 1969).

pressway. However, no mention is made of any camp sites, nature trails, boat launch sites, or any activities which the Sierra Club has ever engaged in along the eastern shore of the Hudson River between the Village of Tarrytown and the Village of Crotonville, New York. The most that respondent Sierra Club claims is that the Sierra Club intervened before the Federal Power Commission in opposition to the Storm King Mountain project in Cornwall, New York. However, this project is on the other side of the Hudson River, at least 15 miles upstream from the area presently under dispute. Merely because the Sierra Club has shown its concern in one limited project along the Hudson River does not give it the right to claim the entire river within its domain for the purpose of bringing any lawsuit it desires.

Similarly, the local Citizens Committee has done nothing in the area of the proposed Expressway in the way of conservation or aesthetic activities, but has existed merely to lobby against the proposed Expressway. The fact that the committee may have expressed its concern in other conservation activities, which allegation was never proved and is open to serious dispute, does not give it sufficient interest to intervene in this particular dispute.

Finally, the brief of the respondents does little to enhance the alleged standing of the Village of Tarrytown. There is no doubt that under New York Law a village lacks standing to assail the validity of proposed State action. In fact, in *County of Albany* v. *Hooker*, 204 N. Y. 1, 9 (1920), New York's highest court held that a subdivision of the State may not attack a decision of the State to construct a new road in the vicinity. The theory behind this case, as well as all others which have followed it is that since a local government is a creature of the State, N. Y. Const. Art. IX, Sec. 2, it has only such powers as the State may give it. *Reynolds* v. *Syms*, 377 U. S. 535, 575 (1964); *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178 (1907); *Williams* v. *Eggleston*, 170 U. S. 304, 310 (1898). Furthermore, the fact that there is an urban renewal area in the

Village of Tarrytown does not sustain standing since uncontroverted proof at the trial showed that title to this area has now vested in the State Urban Renewal Agency. Finally, there is no support for the village's statement that it would lose tax revenues due to construction of the Expressway. Even if this were so, no New York case has gone so far as to warrant standing on this ground alone.

Turning briefly to the issue of the dikes and causeways, it is imperative that this Court give its interpretation of §§ 9 and 10 of the Rivers and Harbors Act of 1899. Until the instant lawsuit, there was no question that the Corps of Engineers had authority to grant permits to fill and place bulkheads protected by dikes in navigable waters in the United States without congressional consent. The reason this practice had not been challenged was not as petitioners suggest that parties lacked standing for such challenge, but that it was patently obvious to any individual that it would be absurd for Congress to pass upon such reclamation projects wherever the word "dike" appears. However, the erroneous decision of the Court below has already engendered at least two other cases which intend to seize upon the same erroneous determination of the presence of a Section 9 "dike" made by the Second Circuit in the instant case.

In *Citizens Commitee for the Columbia River Sierra Club and Washington State Sportsman Counsel, Inc., et al.* v. *Stanley S. Resor, et al.* (No. 69-498) (D. Ore.), plaintiffs are challenging the proposed extension of runways at the Portland Oregon Airport, claiming that dikes and a causeway are involved, requiring congressional approval. In *State of Delaware et al.* v. *Pennsylvania New York Central Transportation Company et al.* (No. 3849—D. Del.), an action has been commenced seeking to enjoin the Penn Central Railroad from filling an embankment along the shore of the Delaware River, on the ground that "dikes" are involved, requiring Congressional approval. The sole support upon which plaintiffs rely in both these cases is *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97 (2d Cir. 1970).

These two cases are only the first of a plethora which are likely to follow unless this Court gives a definitive answer as to whether Congressional consent is necessary before the type of "dike" or retaining wall being built in conjunction with the Hudson River Expressway and numerous other public works projects. As explained in the petition, to require such Congressional approval would be illogical and ill-advised.

Finally, it should be noted that in the case presently pending in the District Court of Delaware, there is on file a sworn affidavit by James E. DeSista, the Chief of the Miscellaneous Civil Branch, Operations Division, Directorate of Civil Works in the Office, Chief of Engineers, Department of the Army, the individual having responsibility for supervising the program for the issuance of permits as contemplated and authorized by Sections 9 and 10 of the Rivers and Harbors Act of 1899. In such affidavit, DeSista describes the issuance of over 30 § 10 permits containing the word "dike" which have been issued without Congressional consent over the past 50 years in the Delaware and Schuylkill rivers alone. The affidavit then goes on to reflect the national application of the long standing administrative practice of the Corps of Engineers in issuing bulkhead and fill operations protected by "dikes" in major public works projects throughout the United States under the authority of § 10 and without Congressional approval;

Date Permit Issued	*Place*	*Waterway*	*Nature of Improvement*
13 January 1931	Boston, Mass.	Charles River	Creation of recreation area by filling 125 to 300 feet inton river.
14 August 1962	Shelton, Ct.	Housatonic River	Highway embankment for 2,250 feet along river.
30 August 1937	New York, N. Y.	East River	La Guardia Airport runways 9,000 feet long.